STATE OF MINNESOTA

DEPARTMENT OF CHILDREN, FAMILIES, & LEARNING

STATEMENT OF NEED AND REASONABLENESS

In the Matter of the Proposed Rules Relating to Desegregation: Minnesota Rules, Chapter 3535 (3535.0100 to 3535.0180)

DCFL

EXHIBIT 77

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I. STATEMENT OF STATUTORY AUTHORITY.

The proposed rules went through several drafts between 1995 and 1997 under the direction of the State Board of Education pursuant to the specific legislative authorization cited below. The final draft, based on a comprehensive review of case law and sociological research, was completed in the winter of 1997. See Exhibit 1 (hereinafter "Ex. ___.") In 1998 the legislature transferred the State Board's rulemaking authority to the Commissioner of Children, Families & Learning. The Commissioner made only minor changes to the draft approved by the State Board. As a result, these proposed rules and the Statement of Need and Reasonableness are products of one continuing process under two different authorized agencies. The accomplishment of all procedural requirements under Minnesota Statutes chapter 14 have been carried out and documented as one continuing rulemaking process executed by two successive authorized agencies.

A. Statutory Authority

The statutory authority for adopting these proposed rules was originally specified in 1994 Minnesota Laws, ch. 647, art.8, §1 which provided as follows:

> (a) The state board may make rules relating to desegregation/integration, inclusive education, and licensure of school personnel not licensed by the board of teaching.

(b) In adopting a rule related to school desegregation/integration, the state board shall address the need for equal educational opportunities for all students and racial balance as defined by the state board.

That legislation was codified as Minn. Stat. §121.11 subd. 7d (1994) and remained the same until the 1998 legislative session.

B. Transfer of Statutory Authority

The 1998 legislature transferred the statutory authority for making rules relating to desegregation to the Commissioner by amending Minn. Stat. §121.11 subd. 7d as follows:

(a) By January 10, 1999, the Commissioner shall make rules relating to desegregation/integration and inclusive education.

(b) In adopting a rule related to school desegregation/integration, the Commissioner shall address the need for equal educational opportunities for all students and racial balance as defined by the Commissioner.

1998 Minn. Laws, ch. 398, art. 5, §7.

II. HISTORY OF POLICY DEVELOPMENT AND PUBLIC INPUT

In 1973, Minnesota was one of a handful of states to set public policy at the state level for public school desegregation. That year the Minnesota State Board of Education adopted Rules Relating to Desegregation (Minn. Rules ch. 3535). In 1978, these rules were amended to specify that segregation occurred any time the minority students in a school building exceeded the percentage of minority students in the school district as a whole by 15%.

Between 1978 and the early 1990's, the demographics in Minnesota changed significantly. In 1984, the protected class student population in Minneapolis Public Schools was 37%; in 1997 it was 67.8%. Similarly, in St. Paul Public Schools it was 33% in 1984 and 60.5% in 1997. In addition, while initially only the metro area schools were affected by the rules, by the mid 1990's, some outstate districts were also affected.

The proposed rules have been evolving over the past several years in response to these changing demographics and are the product of much discussion and debate from various stakeholder constituencies. In the summer of 1989, it became clear that changes needed to be made to the rules again. The Board expanded on preliminary discussions with leaders from various communities of color by convening an eight-member task force to examine issues and possible new desegregation approaches. In May 1990, the Board expanded the composition of the task force and formally convened it as the Desegregation Policy Forum, with Curman Gaines of St. Paul and Jean Olson of Duluth as co-chairs. In November 1990, the Desegregation Policy Forum submitted a report to the Board.

In early 1991, the Board held twelve public input meetings in Duluth, Detroit Lakes, Bemidji, Rochester, St. Cloud, Willmar, North and South Minneapolis, Richfield, West St. Paul, St. Paul and Roseville. The purpose of these meetings was to discuss the Policy Forum recommendations and to provide opportunity for statewide public input on a new desegregation rule. In May 1991, the Board adopted preliminary recommendations and a set of working assumptions for developing a new desegregation rule, based on the Desegregation Policy Forum report. See Ex. 2.

In the spring of 1992, the Board convened an ad hoc advisory committee to assist in the drafting of a new desegregation rule. The Board discussed preliminary drafts over a period of several months. In November 1992, the Board adopted preliminary drafts of proposed desegregation rules for public dissemination, which focused primarily on educational results, rather than racial balance. From November to December 1992, there was substantial public discussion and debate regarding those very preliminary drafts.

In the spring of 1993, the legislature adopted legislation that required the State Board to convene a "Desegregation Roundtable." The Roundtable was asked, among other things, to develop recommendations on the proposed changes to the desegregation rule that would affirm the principles of Brown v. Board of Education. It was also directed to review the state's "desegregation and inclusive education rules," and to recommend ways to improve them. See Ex. 3 (1993 Minn. Laws, ch. 224, art. 9, §46).

In August 1993, after considering how to revise the desegregation rule, the Board adopted a set of working principles. Those are attached as Ex. 4. The Roundtable met several times and thereafter drafted new rules, which about 30 of the metro area's schools superintendents endorsed. In February 1994, the SBE approved the rules as a working draft and sent them to the legislature requesting authority to promulgate them. See Ex. 38.

In May 1994, the legislature passed enabling legislation that gave the State Board authority to enact new desegregation rules.[1] However, the legislature did not pass all the legislation necessary to promulgate the rules in the 1994 Roundtable version. Importantly, the legislation did not include a provision requiring that districts closed for open enrollment purposes be forced to admit non-white students from Minneapolis regardless of space; it did not give the State Board the authority to reconstitute schools and it did not give the Commissioner the authority to assume control of schools that failed to close the learning gap. Furthermore, the legislation did not authorize the Board to address learning outcomes, but rather only "equal educational opportunities". Finally, although the Roundtable's 1994 draft clearly required districts to provide cross-district opportunities, the legislature did not give the State Board of Education the authority to order cross-district busing.

During the spring and fall of 1994, the State Board discussed how the rule draft might be revised, in light of the 1994 legislative directives. In January of 1995, the Desegregation Roundtable submitted updated recommendations to the Board considering these directives.

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[1] See 1994 Minn. Laws ch. 647, art. 8, sec. 1 (Ex. 6). That legislation provided the authority for the State Board of Education to propose a desegregation rule, and as discussed above, in 1998 that authority was transferred to the Commissioner. See 1998 Minn. Laws, ch. 398, art. 5, §7.

Moreover, the Department of Children, Families and Learning presented an alternative approach to the Roundtable proposal. That alternative is attached as Ex. 7.

In February 1995, the State Board approved a revised preliminary draft based primarily on the Roundtable's draft proposals and sought more public discussion on the issue. The rule was also given to the attorney general's office for comprehensive review and legal analysis. The DCFL continued to suggest a different approach than that proposed by the Roundtable. In the fall of 1995, the Republican caucus issued an analysis of the Roundtable draft that was highly critical. See Ex. 8. Also, in the fall of 1995, the State Board accepted the Department's recommendations and began consideration of what evolved into the rule now being proposed.

In 1995-1996, an extensive review of caselaw was conducted by the attorney general's office at the direction of the State Board of Education. A review of current sociological and education research in the area of desegregation was also conducted. Throughout 1996 and 1997, the proposed rules were developed consistent with State Board discussions of the findings of both the caselaw review and the literature review, and continued public input.

In May, 1996, in addition to its monthly board meetings, the State Board held two public meetings to specifically discuss the desegregation rule and the changes made since the Roundtable draft.

In December 1997, a completed revisor's draft of the proposed rules was approved by the State Board. Subsequently, the 1998 legislature enacted a transfer of rulemaking authority for the promulgation of desegregation rules from the State Board to the Commissioner of the Department of Children, Families & Learning.

During the summer and early fall of 1998, the Commissioner met with the Desegregation Advisory Board (Minn. Stat. §121.1601, subd.3 (1996 and Supp. 1997)), and superintendents of various school districts that will be affected by the proposed rules. The meetings were convened to review the policy issues of the State Board's 1997 draft of proposed rules and to get input on implementation issues. The Commissioner directed staff to finalize the rules and to commence rulemaking procedures in accordance with Minnesota Statutes chapter 14.

III. STATEMENT OF NEED FOR THE PROPOSED RULE.

Evidence to support the need for the proposed rules comes primarily from four major sources:

1. The mandates from the Minnesota legislature in 1996 giving authority to the State Board of Education to pass a desegregation/integration rule and in 1998 directing that "the Commissioner shall make rules." (1998 Minn. Laws, ch. 398, art. 5, sec. 7). These are stated in Section I, "Statutory Authority".

2. An extensive review of 25 years of changing caselaw in state courts, federal courts and in the U.S. Supreme Court pertaining to desegregation, particularly

regarding the changing definitions of "segregation". References to this caselaw are stated particularly in Section III. and are also used throughout this document to provide evidence to support the need for the proposed rules.

3. A review of changing demographics over the past 10-15 years and the impact of this on school districts under the current desegregation rules. References to this review appear particularly in Section III.B. of this document.

4. A review of current education and sociological literature regarding the effect of desegregation/integration on students. References to such literature appear throughout this document.

A. The Concept of "Segregation" has Undergone Great Change Since the Rule was Adopted and This Change Should be Reflected in a New Desegregation Rule.

The single most important judicial decision in the history of our country, in terms of equality between races, came in the landmark case of Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686 (1954). In that unanimous decision, the United States Supreme Court held that the government cannot intentionally maintain segregated school systems for white and black children.

Since the Brown decision, courts and states have struggled with what types of policies and systems should be used to eliminate the vestiges of state-mandated segregation. Minnesota never had state mandated segregated schools; therefore, with one exception[2] the issue which the Court confronted in the Brown decision was not an issue in this state.

As the policy implications of Brown evolved, a few states, including Minnesota, drafted desegregation rules in the 1970s to ensure that districts did not engage in intentional segregation and also to ensure that there would be a "proper" racial balance in school sites. See, e.g., Conn. Agencies Regs. §226-e.[3] The current Minnesota rule, (Minn. Rules, chapter 3535) which was originally promulgated in 1973 and later amended in 1978, is a response to that policy.

The policy goal of having a particular balance among racial groups to ensure the benefits of integration is often traced to the Brown decision. Brown has been cited for the proposition that "racially isolated" schools are inherently inferior or unequal; therefore, the argument goes, the state and school districts should ensure that there is an appropriate "racial balance" of

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[2]In Booker v. Special School District No. 1, 351 F.Supp. 799 (D. Minn.1972), the Minnesota federal district court held that the Minneapolis School District had engaged in intentional discriminatory acts and imposed an injunction prohibiting the conduct and requiring remedies.

[3] California, Illinois and New Jersey had such rules, but have since been repealed. Very few states currently have explicit racial balance rules or laws. Besides Connecticut and Minnesota, Massachusetts was the only state located that had such a rule. For a chart describing the rules or statutes in 39 of the other 49 states, see Ex. 9.

students of color and white students in all public schools so that students of color will receive an equal educational opportunity. However, as long ago as 1973,[4] the Supreme Court clearly held that the goal of obtaining a certain "racial balance" is not required by the Brown decision or by the U.S. Constitution. Similarly, in 1974, the Court held: "[t]he target of the Brown holding was clear and forthright: the elimination of state-mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils." Milliken v. Bradley, 418 U.S. 717, 94 S. Ct. 3112, 3123 (1974) (emphasis added).

It is important to understand that in Brown, the Supreme Court found that government-mandated segregation was harmful. The oft-quoted line that "separate can never be equal" was premised in part on the psychological harms that were said to flow from segregated schools which were required by the state. The Court noted of children in such schools that, "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Brown, 347 U.S. at 494, 74 S. Ct. at 691. However, the social science statement submitted by 32 anthropologists, psychiatrists, psychologists and sociologists, and relied on by the Court in coming to its psychological conclusion was specifically addressed to the effects of government-enforced segregation; it attempted to predict what benefits might be expected if children did not attend state-segregated schools. See Stuart W. Cook, Social Science and School Desegregation: Did We Mislead the Supreme Court?, v. 5, no. 4, Personality and Social Psychology Bulletin 420, 422 (1979).

Thus, concluding that any and all types of racial imbalance cause harm, and must be remedied through racial quotas, is premised on erroneous legal and sociological theories.[5] Moreover, this view, represented by the current rule, has led to negative educational consequences. As a result of a dramatic changes in demographics, the current rule's emphasis on a particular degree of racial balance has resulted in a loss of flexibility for districts struggling to maintain a certain racial balance that is not required by the Constitution and that is questionable as an educational goal. It has meant that students of color have been turned away from enhanced magnet programs specifically designed to serve them. It has also led to considerably less student and parental choice for the very students who most need assistance.

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[4] See Keyes v. Special School Dist. No. 1, 413 U.S. 189, 93 S. Ct. 2686 (1973)

[5] Some social scientists have concluded that certain forms of desegregation efforts are actually counter-productive; for example, massive bussing and similar mandatory forms of desegregation can lead to significant white flight which lessens the opportunity to maximize the benefits associated with desegregation. See James S. Coleman, et al., Trends In School Segregation (Washington D.C.: Urban Institute, 1975); Christine H. Rossell, Applied Social Research: What Does It Say About the Effectiveness of School Desegregation Plans, Journal of Legal Studies, 12:69-107 (1983); Christine H. Rossell, Estimating the Net Benefits of School Desegregation Reassignments, Educational Evaluation and Policy Analysis, 7:217-227 (1986); Robin D. Barnes, Black America and School Choice: Charting a New Course, 106 Yale L.J. 2375 (1997) arguing that desegregation efforts have not succeeded; also stating "school choice may be the one movement capable of responding to the needs of diverse communities with a message we all understand: that 'separate but equal' in public institutions is impermissible only when involuntarily imposed." Id. at 9. See also discussion in Section V.G.

Thus, one fundamental goal of the proposed rule is to implement the important holding of Brown: that intentional segregation cannot be tolerated and will be eliminated. If, after evaluating factors indicative of intentional segregation a district is found to have engaged in such segregation, the district will be required to propose a plan to eliminate that condition. If the proposed plan will not remedy the segregation, the Commissioner of the Department of Children, Families and Learning will develop a plan which the district must use. Three different types of sanctions can be utilized to enforce the plan development and implementation.

However, the proposed rule is different from the present rule because it recognizes that there are important distinctions, both legally and sociologically, between segregation which is the result of intentional, discriminatory conduct and that which is "racial imbalance." The present rule assumes that there should be a certain racial balance, and requires districts to propose desegregation plans when that balance has been exceeded. The proposed rule, like the Constitution, does not require schools or districts to maintain any particular degree of "racial balance."

Importantly, the proposed rule seeks to promote racial integration without the use of racial quotas. If racially isolated schools or districts exist because of factors not caused by intentional segregation, the proposed rule requires districts to develop plans which will encourage voluntary integration by students and parents through programs and opportunities which will include incentives aimed at effective integration; however, parents and students will have the ultimate choice concerning whether and how to best utilize these opportunities. If a district is successful in improving a condition of racial isolation at a particular site, this will be reported to the legislature, which has the authority to provide financial rewards and incentives to districts providing meaningful choices. If a district is not engaged in effective integration efforts, this too will be reported.

The report to the legislature in this context is extremely important, because the legislature has far greater authority and flexibility in responding to integration issues. Under the present statutory framework, the Commissioner of Education has only one remedy, which is withholding state aid. This is a measure which may hurt students as much or more than the district, under certain circumstances. However, the legislature has much broader authority and could take more precise action aimed at requiring a recalcitrant district to engage in meaningful integration planning, without penalizing students. This could include targeted re-direction of funds, re-drawing district lines, reconstituting schools or other remedies, which can only be imposed by legislative authority.

Reasonable people have differed and will continue to differ about how integration efforts should be implemented. Some still argue that racial quotas, obtained by busing, must be maintained. Others argue that such efforts have not worked.[6] Still others believe that the most important policy consideration is no longer busing but providing a quality education wherever students chose to go. See Steve Farkas and Joanna McHugh, Time to Move On, A Report from Public Agenda, 1998.

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[6] Book Note, The Desegregation Dilemma, 109 Harv. Law. Rev. 1144 (1996) (reviewing David Armor Forced Justice (1995)).

Admittedly, the proposed rule is different in important respects from the draft proposed by a Roundtable convened by the legislature in 1993 to make desegregation rule recommendations. The recommendations from that group, and the reasons for departing from those recommendations are discussed in great detail in Appendix B.

Many will argue, as did some in the Roundtable group, that a certain degree of racial mixing based on numerical racial percentages should be required, both within districts and across district lines. However, as the discussion in Section III.C. demonstrates, recent cases in the federal courts have cast serious doubt upon the ability of states to use race-based remedies, such as quotas and assignments of students on the basis of race, without a finding of intentional segregation. The proposed rule mandates the elimination of intentional segregation but at the same time uses a variety of methods to reduce racial imbalance not caused by intentional acts of the district. In this way, it is intended that the mandate of Brown can be met, and that parental choice can be used in conjunction with other non-race-based strategies to encourage integration.

B. Changing Demographics, Especially in Urban Areas.

1. Changes within school districts

Another compelling need for the change in Minnesota desegregation policy and the proposed rules is that the demographics of the state, particularly in urban areas, have changed dramatically since the current rule was adopted. While the assumptions underlying the current rule made sense given the demographics 15-25 years ago, they simply do not make sense, and are not workable, today.

The situation in the Minneapolis School District (hereinafter, "Minneapolis" or "MSD"), while perhaps the most extreme of the urban areas, certainly illustrates the problem. In 1969, the protected student population was 12%. In 1972, when the Minneapolis School District came under court order to desegregate, the protected population was around 15%. This was the highest concentration of protected students in any school district in Minnesota at the time. In 1978, when the 15% portion of the rule was adopted, the concentration was 24.4%. See Ex. 10.

Given those percentages it was reasonable to conclude, as did the current desegregation rule, that "segregation" occurred when the student of color (also referred to as "protected student") population at certain schools was more than 15 percentage points above the rate of protected student attendance in the district as a whole.[7] In 1978, the "fifteen percent rule," as it has come to be known, left a great deal of room for planning and flexibility, even in the district with the highest concentration of protected students.

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[7] In fact, the disparity between the racial balance at certain schools versus other schools contributed greatly to the federal court's conclusion that MSD had engaged in intentional segregation. The court found that "[o]ver 55% of the Black elementary school children attend schools with a Black enrollment of over 30%, while 74% of the White elementary school children attend schools with Black enrollments of less than 5%." Booker v. Special Sch. Dist. No. 1, 351 F.Supp. 799, 802 (D. Minn. 1972).

However, the demographics changed dramatically over the ensuing years. In 1984, the protected student population in Minneapolis was 37%; in 1989, it was 50%[8] and by the fall of 1997, the enrollment was 67.86%.[9] From an implementation standpoint, this means that under the current rule the protected student enrollment at any elementary school in Minneapolis would need to be 82.86% before a condition of "segregation" exists. Further, the current rule provides that a school site can exceed the protected student enrollment by as much as 30% if there is a legitimate educational reason (see Minn. Rules pt. 3535.0700). This means that schools in Minneapolis can have more than literally 97.86% students of color and still be in compliance with the rule. Clearly, the demographics have changed the way in which we define when "segregation" occurs; automatic conclusions based on strict formulae are no longer reasonable. It is necessary to look at the conditions which have caused the concentrations of protected students to determine whether a condition of segregation has, in fact, occurred.[10]

Another need propelling the rule change is that requiring districts to maintain schools with a racial balance within 15% of the district-wide average has caused some districts to rely on quotas to stay in compliance. In some instances, once a school reaches the point where its enrollment of protected students is 15% above the district-wide average, no more protected students are allowed to enroll in that particular site. This has led to tremendous frustration and sometimes hardship for many students. For example, one district established a Language Magnet School, which offers Spanish and Ojibwe language/culture programs to help balance its Caucasian and American Indian student enrollments. The magnet was very popular with American Indian students; so popular, in fact, that for at least two years the district told some American Indian students that they could not attend the school because the racial balance requirements of the rule had been exceeded. Therefore, a portion of the very population which this magnet was intended to benefit was being turned away, while white students were being admitted into the program.[11] This is not an uncommon feature of racial quotas. One author studying the use of quotas in Chicago Public Schools found that frequently quotas actually limit the opportunities of students of color. See Michael Heise, An Empirical and Constitutional Analysis of Racial Ceilings and Public Schools, 24 Seton Hall L. Rev. 921 (1993).

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[8]Source: League of Women Voters, "Metropolitan School Desegregation and Integration Study", chart, p. 7. (Ex. 11.)

[9] Ex. 12, 1997-98 Minority Enrollment Comparison Report.

[10] The demographics in the St. Paul school district have evolved in a very similar way to those in Minneapolis. In 1969, the protected student population was 11%; in 1974, it was 14%; in 1979, it was 22%; in 1984, it was 33%; in 1989, it was 42% (Source: League of Women Voters Chart Ex. 11, footnote 6), in 1996-1997, it was 57.4%, Ex. 13, and in 1997-1998 it is 60.5%, Ex. 12. Other urban districts currently (1997-98) have much higher concentrations of protected students now than they did in early 1970's, including: Bloomington at 18.32%; Osseo at 17.63%; Robbinsdale at 19.40%; Brooklyn Center at 39.28% and Richfield at 25.61%. Ex. 12.

[11] At the time of writing this document, the district in question no longer turns away American Indian students from this magnet program for reasons of "racial balance."

Another example of the difficulties caused by strict adherence to racial balance requirements became very apparent in 1996 when the Minneapolis Public Schools requested a variance from the 15% requirement. Like other districts, Minneapolis has used racial quotas or "ceilings," among other strategies, to stay in compliance with the current rule. Schools that reached their capacity for protected students were often full at the beginning of the school year, so protected students coming into the district after the school year began were often assigned to schools far from home. It was not uncommon to assign three or more siblings to three or more elementary schools. For families without transportation, this meant no real ability to be involved with or even connected to the schools attended by their children. Again, this disparate impact tended to fall on protected students, since they were disproportionately those students who arrived after the school year had begun. See Findings of the State Board of Education, p. 4 (Ex. 14).

Another technique used by the Minneapolis School District to achieve racial balance was to offer a wide variety of educational choices with the goal of achieving voluntary integration. In some instances, students could choose from as many as eighteen different school sites in the elementary grades.

Over the past 10-12 years, the District has been quite effective in attaining the racial balance required by the rule. See Findings of the State Board of Education, p. 3 (Ex. 14). However, using such a wide variety of choices proved to be frustrating for parents and students and actually disadvantaged many students. The following findings of the State Board of Education illustrate the difficulty encountered by MSD with its system:

- The great variety of choices has often been confusing and alienating to families. The number of choices has also lessened the ties between the community, parents and students. Finally, it has meant less stability and predictability for families.

- The present system also disadvantages families who come into the District after the registration process is complete. Because spaces fill up, families are often forced to send their elementary students to schools far away from home. Many times, siblings are unable to attend the same school. These families are more frequently students of color.

- The distances which some children must travel in order to attend school makes it very difficult for parents who do not have transportation to become involved in school activities or even attend parent-teacher conferences. This has a very negative impact on parental involvement. . . . The situation is exacerbated when siblings are forced to attend more than one school. Furthermore, because of lack of transportation, the barriers imposed by distance are greater for low-income families, who also tend to be families of color. In the Metropolitan Council Study, "Trouble at the Core: The Twin Cities Under Stress," November, 1992, a significant finding was that more than half (56%) of American Indian households do

not have cars; 47% of African American households and 36%of Asian/Pacific households in the inter-cities Minneapolis and St. Paul do not have cars.

- The present system also makes it very difficult to establish ties between the school and the community, and makes it difficult for the school to engage in effective outreach to the community, including parents, students and the community as a whole.[12] For example, currently in the Whittier neighborhood, students attend schools in 50 different neighborhoods; on the West Bank, students attend 34 schools. See Ex. 14, p. 4.[13]

For all of these reasons, MSD decided to return to a "community based" school program, with fewer options for students and a return to guaranteed choices for students to attend school in their neighborhood. However, in order to make this policy shift, MSD had to request a variance from the present rule to allow a certain number of its schools to exceed the 15% requirement. Although the variance was ultimately approved, the evaluation process was extensive and cumbersome. A complete analysis of the evaluation which had to be undertaken in order for the District to provide the type of programming it had determined was in the best interest of its

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[12] The comments of Peter Hutchinson to the Waiver Panel on December 21, 1996, articulate this problem:

> When you're a school in our community today and you have youngsters coming from all over the city, it is very difficult for that school to create a real sense of attachment to the immediately surrounding community and visa-versa. When we change to having schools that are actually there to serve the community in which they're located, we create all kinds of opportunities for that school and that community to build relationships with one another. Certainly in the classroom, maybe in terms of youngster walking to school in the morning or home in the evening. Certainly in terms of parents being able to volunteer . . . . But equally important, after school and on weekends when the school can become a real resource in the community because it's part of the community. Those youngsters and those adults who use it in the daytime will feel equally comfortable using it at night. . . . We have actually challenged our schools that plan to be converted to community schools to begin now to make those community connections. To literally go door-to-door if that's what it takes. . . . We believe long term that when we fully integrate this school system with the community of which it's a part, we create a real possibility for long-term mutual support for the lives of our children . . . our families . . . our businesses and non-profit community—something that literally is a terrible challenge for our schools today.

[13] This variation on the controlled choice model has been noted to cause white flight or deter whites from moving into a district. The lack of certainty is an issue for many parents. See Christine Rossell, The Carrot or the Stick for School Desegregation Policy: Magnet Schools or Forced Busing, 200 (1990).

students can be appreciated by reviewing the voluminous findings and conclusions issued by the State Board of Education and the Commissioner (included as Exs. 14 and 16 respectively.)

The proposed rules are needed to provide protection against intentional acts of segregation. They are also needed to provide meaningful options for integration, both within and across district lines; to give parents and students better choices which are more rooted in programming; and also to give districts more flexibility in responding to the needs of their communities.

2. Changing demographics across district lines

While the inner city districts' protected populations continue to increase, in some districts surrounding Minneapolis and St. Paul this was not the case. For example, there are several districts contiguous to the Minneapolis School District. In those districts during the 1997-98 school year, the protected student population ranges from a high of 39.28% in Brooklyn Center, to a low of 6.22% in Edina. In the suburbs surrounding St. Paul, the highest concentration of protected students was West St. Paul with 17.22%, going down to 7.38% in South Washington County. See Ex. 12.

These demographics have been of increasing concern to the Minneapolis and St. Paul districts, as well as others. In the late 1980's, the superintendents of those districts began to call for cooperative efforts to integrate across district lines. The legislature has supported these initiatives, and beginning in the 1987-88, has annually appropriated funds to address integration issues. See for example, Minn. Stat. §124.315 (Supp.1997), as amended by 1998 Minn. Laws ch. 398, art. 2, §§4 – 5. However, monitoring of these conditions needs to be more systematized. Moreover, there should be a structure in place to formally require cross-district planning and cooperation, to ensure that it happens.

Finally, the present rule does not address the difficulties many small districts have in providing effective integration efforts; the current rule is written, to a large extent, from an urban perspective. However, it is important to note that 200 or more of the states' approximately 365 districts are small. Many have student enrollments in grades K-12 of less than 1000; many have only one elementary, middle and high school. See Ex. 15. For these districts, it is difficult to provide any kind of racial integration unless cooperative efforts across district lines are encouraged. The current rule does not address this issue; the proposed rule seeks to provide the means and incentives for remedying it.

C. Changing Case Law in the Federal Courts Since 1970's.

Another compelling need for this proposed rule change is that the constitutional underpinnings for racial integration have changed since the rule was originally adopted.

1. The old rule did not distinguish between intentional segregation and "racial imbalance."

As discussed above, the landmark decision of Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686 (1954) is sometimes cited for the proposition that any time there is a racial imbalance in schools, the state or the district where that imbalance occurs has an affirmative duty to correct the imbalance. However, it is important to view Brown in the factual context in which it was decided. Brown dealt with government-imposed, intentional segregation of students based on their race; it did not deal simply with a condition of racial imbalance. At that point in the Court's consideration of segregation, there was no reason to address whether it would be appropriate to order race-based remedies without intentional discrimination because that issue was not before the Court.

In the late 1960's and early 1970's, courts began making a distinction between acts of intentional segregation, sometimes known as "de jure" segregation, and racial imbalance, sometimes know as "de facto" segregation. In the 1972 case of Booker v. Special School District No. 1, 351 F.Supp. 799 (D. Minn. 1972), Judge Larson noted that courts were beginning to distinguish between segregation "imposed by law" and segregation which results from pupil assignment policies not based on race, or other conditions for which government is not directly responsible. The present rule was originally promulgated in 1973, when the distinction between intentional segregation and racial imbalance was still being formulated by courts.

Since that time the United States Supreme Court has decided a large number of cases which give further definition to the concept of when legally actionable segregation has occurred. In Keyes v. Special School District N. 1, 413 U.S. 189, 93 S. Ct. 2686 (1973) the Supreme Court clearly articulated the distinction between "intentional segregation" and "racial imbalance." In that case, the Court held that in order to find unconstitutional segregation, plaintiffs had to prove ". . . . a current condition of segregation resulting from the intentional state action directed specifically to the [allegedly segregated] schools." Id. at 205-06. "The differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate." Id. at 208. In Milliken v. Bradley, ("Milliken II"), 433 U.S. 267, 280 n.14, 97 S. Ct. 2749, 2757 n.14 (1976), the Supreme Court, citing an earlier opinion, stated "the Court has consistently held that the Constitution is not violated by racial imbalance in the schools without more." See also Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434-35, 96 S. Ct. 2697, 2703-04 (1976); United States v. Fordice, 505 U.S. 717, 745, 112 S. Ct. 2727, 2744 (1992) (Thomas, J., concurring). School desegregation cases have repeatedly emphasized that the fact that many of a community's schools are predominantly white or predominantly black does not offend the Constitution. Dayton Bd. of Educ. v. Brinkman, 433 U. S. 406, 417, 97 S. Ct. 2766, 2774 (1977). In order for a constitutional violation to occur, there must be a condition of segregation; the offending governmental entity must have caused that segregation, and it must be the result of an intent to discriminate. Keyes v. Spec. School Dist. No. 1, 413 U.S. 189, 2008, 93 S. Ct. 2686, 2697 (1973).

2. Race-based remedies are highly questionable absent a finding of intent to discriminate.

a. Federal opinions regarding race-based remedies.

Recent cases in the federal district and circuit courts and at the United States Supreme Court call into serious question whether it is permissible to have a rule which requires or even encourages race-based student assignments, such as quotas and mandatory busing, absent a finding of intentional discrimination.

Twenty years ago, in Regents of University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978), it appeared that the Supreme Court would permit consideration of racial diversity as one factor among many others in evaluating applications to law school.

In that case, the Court considered the legality of a set-aside of 16 spaces (out of 100) for members of minority groups or disadvantaged students at the University of California Medical School at Davis. The Court's decision was a not majority decision. Four justices would have upheld the quota on the grounds that it served a benign purpose of remedying past discrimination. Four others would have struck down any use of race. Justice Powell, writing for the Court, agreed with the justices in the minority that racial quotas are unconstitutional. He also found that race could not be the only factor used to award admission to a certain number of students. However, Powell did not prohibit all uses of race in the admissions process. He wrote that obtaining a diverse population is "clearly a constitutionally permissible goal." Id. at 311-12, 98 S. Ct. at 2759. Powell also stated that race could be considered as one among many factors used in evaluating an applicant's file. Id. at 317, 98 S. Ct. at 2762.

Since Bakke, the Supreme Court has found that diversity is a compelling state interest in only one case, and that case was not in the education context.[14] Moreover, over the past several years, the goal of attaining racial diversity in various other contexts has been held insufficient to establish a compelling state interest by both the Supreme Court and several circuit courts.

In Wygant v. Jackson Board of Education, 476 U.S. 267, 283-84, 106 S. Ct. 1842, 1852 (1986), the Court held that layoff provisions in a collective bargaining agreement giving preference to teachers based on their race was not permissible. The Court reasoned that having role models for students of color, (which is related to the concept of diversity) was not a compelling state interest. The lay-off policy was struck down.

In City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706 (1989) a majority of the Justices invalidated a city ordinance setting aside thirty percent of its contracting work for minority-owned businesses. The Court found that remedying the distant past effects of general societal discrimination was insufficient to support a preferential contracting program. The Court also established that "strict scrutiny" would be used to judge the constitutionality of set-aside programs which were race-based, even if the programs were established for a benign purpose.

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[14] See Metro Broadcasting, Inc v.FCC, 497 U.S. 547, 110 S. Ct. 2997 (1990), in which the Court held that racial set-asides for certain minority broadcasters could be sustained in the interest of promoting diversity in broadcasting. However, a portion of Metro was overturned a few years later in Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S. Ct. 2097 (1995). Metro's continued vitality has been strongly questioned by commentators and Supreme Court Justices alike. See this Section, part b., below.

These two cases are also significant in establishing the evidentiary standard which must be satisfied to justify a finding of past discriminatory conduct. In Wygant, the Court "insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." Wygant, 476 U.S. at 274, 106 S. Ct. at 1847. Further, in Croson, the Court, in discussing how far back the discriminatory conduct could reach, noted that "[l]ike the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." Croson, 488 U.S. at 499, 109 S. Ct. at 724. This dicta suggests that the past discriminatory actions cannot be too distant from the present remedial efforts.

Finally, in Adarand, the Supreme Court held that any federal race-based classification, even those to bestow a protection or benefit, are inherently suspect and must withstand an exacting analysis in order to be upheld. To pass constitutional scrutiny, all racial classifications, whether municipal, state or federal, must 1) satisfy a "compelling governmental interest", and 2) be narrowly tailored to meet that interest. Adarand, supra at 2113.

Several circuit courts, including the 3rd, 4th, 5th 7th and 9th have also severely limited the use of race-based measures in several different contexts. In the Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), petition for cert. denied, 518 U.S. 1033, 116 S. Ct. 2581 (1996), decided in the wake of Adarand, the Fifth Circuit Court of Appeals specifically held that any racial preferences in admissions policies at a state-operated law school could not be sustained based on the argument that diversity is a compelling state interest. Three reasons were given for this holding. Writing for the majority, Judge Smith found that Justice Powell's opinion in Bakke never presented the view of a majority of the Court. Id. at 943. Second, the court argued that Justice Powell's opinion was not binding, since "no case since Bakke has accepted diversity as a compelling state interest under a strict scrutiny analysis." Id. After examining subsequent Supreme Court opinions, the Court said that there is "only one compelling state interest to justify racial classifications: remedying past wrongs." Id. At 944-45. Finally, the Fifth Circuit court argued that there are strong policy arguments against using racial set-asides or quotas to promote diversity. Although the case was appealed to the Supreme Court, the Court refused to reverse or even consider the case.

The Hopwood case is not alone in its position on race-based affirmative action. In Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), cert. denied, 514 U.S. 1128, 115 S.Ct. 2001 (1995), the Fourth Circuit declared unconstitutional a separate merit scholarship program solely for African American students at the University of Maryland. The reasoning in Podberesky, which was adopted by the Fifth Circuit in Hopwood, characterized race as the "most pernicious . . . criteria by which men and women can be judged." Podberesky v. Kirwan, 38 F.3d 147, 152 (4th Cir. 1994).

A very recent Ninth Circuit opinion is consistent with the trends in the above decisions. In Coalition for Economic Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1997), cert. denied, 118 S.Ct. 17 (1997) the court considered whether California's newly enacted "Proposition 209"

denied minorities and women equal protection because of its ban on the use of preferential treatment based on race and sex (among other categories).[15] The court found:

> [w]hen . . . a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in neutral-fashion race-related and gender-related matters. It does not isolate race or gender anti-discrimination laws from any specific area over which the state has delegated authority to a local entity. Nor does it treat race and gender anti-discrimination laws in one area differently from race and gender anti-discrimination laws in another. Rather, it prohibits all race and gender preferences by state entities .... .Impediments to preferential treatment do not deny equal protection.

Id. at 1444-45 (footnote omitted).

The Seventh and Third Circuits have also issued recent opinions on affirmative action. The Seventh Circuit case, People Who Care v. Rockford Board of Education, 111 F.3d 528 (7th Cir. 1997), struck down racial quotas in student assignments to certain programs and in disciplinary proceedings as inequitable. Id. at 536-37. With regard to the racial quotas for student discipline (which required that the district not refer a higher percentage of minority than white students for discipline without meeting certain criteria) the court stated: "Racial . . . quotas violate equity in its root sense . . . . They place race at war with justice. They teach schoolchildren an unedifying lesson of racial entitlements." Id. at 538. The court also invalidated a requirement that a certain percentage of the teachers in each school be black or Hispanic because there had not been a finding of intentional segregation against minority teachers in the district. Id. at 534-35.

The Third Circuit, in Taxman v. Board of Education, 91 F.3d 1547 (3d Cir. 1996), cert. granted, 117 S. Ct. 2056 (1997) found that the district's affirmative action policy of preferring minority teachers over equally-qualified white teachers in layoff decisions was prohibited by Title VII. Id. at 1564. The policy had been adopted to promote racial diversity, not as a remedy for past discrimination. Id. at 1564-65.

The court explained its reasoning by referring to the purpose of Title VII: "It is only because Title VII was written to eradicate not only discrimination per se but the consequences of prior discrimination as well, that racial preferences in the form of affirmative action can co-exist with the Act's anti-discrimination mandate." Id. at 1557.

The court acknowledged that the federal courts have not yet decided a Title VII case in which racial diversity in education was the only justification for race-based decisionmaking. Id. at 1559. However, the court stated that the school board could not rely on the goal of diversity to justify its policy because, despite the "educational value of exposing students to persons of diverse races and backgrounds" this goal is not "a permissible basis for affirmative action under

[15] Proposition 209 provided in relevant part "[t]he state shall not discriminate against or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Id. at 1434 (quoting Cal. Const. art. 1, §31(a)) (footnote omitted).

Title VII." Id. at 1561.[16] The U.S. Department of Education has also changed its eligibility standards for grants from the Magnet Schools Assistance Program. The standards direct districts seeking magnet school grants to try or seriously consider race neutral means of admitting students, unless they are under integration orders. See Ex. 17. This is a departure from an earlier, more liberal interpretation allowing race-based measures. See Ex. 18.

b. Legal commentary suggests that the need for diversity in higher education classrooms is not likely to be found a compelling state interest which would justify race-based assignments; it is also not likely in the K-12 setting.

Some have argued that the impact of Adarand and Croson is limited to remedial programs involving government contracting and should not invalidate programs in the educational context aimed at promoting diversity. See, e. g., Richard Kahlenberg, Class Based Affirmative Action, 84 California Law Journal 1037, 1039 (1996) (hereinafter "Kahlenberg") citing Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice, to General Counsels (June 28, 1995) (Ex. 18, above). Others have argued that as in Bakke, race can be a factor in admissions, particularly in institutions where there has been a long practice of segregation, or where there is a statistical under-representation of students of color. See e.g., Leland Ware, Tales for the Crypt: Does Strict Scrutiny Sound the Death Knell for Affirmative Action in Higher Education? 23 Journal of College and University Law 43 (1996). However, Richard Kahlenberg analyzes the likely outcome of the Court finding diversity to be a compelling state interest this way:

> The five-to-four decision in Metro Broadcasting[17] is surely the high water mark for diversity as a justification for racial preference. Since the 1990 decision, four of the five Justices in the Metro majority have retired, leaving Justice Stevens as the only sure pro-diversity vote. The four Metro dissenters—Justices O'Connor, Kennedy, Scalia and Rehnquist—remain, and they will surely be joined by Justice Thomas in opposition to most forms of racial preference. Thomas has been opposed to most forms of racial preference, but is particularly opposed to the diversity rationale, which presumes, in the aggregate, that people of color have a certain viewpoint. Even Sheila Foster, a strong proponent of the diversity rationale, concedes, "[I]t is unlikely, given the current makeup of the Court, that the diversity rationale will survive in equal protection jurisprudence." While Metro Broadcasting was once hailed as an open door to broader application of

[16] In an apparent effort to avoid an adverse ruling on this question, civil liberties groups, in November 1997, offered the plaintiff a large settlement. Consequently, the Supreme Court did not rule on this matter.

[17] In Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 110 S. Ct. 2997 (1990), overruled in part by Adarand, 515 U.S. 200, 115 S. Ct. 2097, the Supreme Court considered a challenge to two separate FCC policies which were designed to encourage minority ownership of broadcasting licenses to promote diversity of ownership. Metro, 497 U. S. at 566, 110 S. Ct. 3009. The Court applied an intermediate level of scrutiny to this interest, which was overruled in Adarand.

the diversity rationale, it now appears clear that the rationale has very limited applicability beyond the higher education arena."

Kahlenberg, supra, at 1043 (emphasis added) (footnotes omitted).

Moreover, Kahlenberg argues that the original concept of diversity as used in Bakke was limited to higher education institutions. He notes that the "wording of Justice Powell's opinion in Bakke was carefully circumscribed: "the interest of diversity is compelling in the context of a university's admissions program." Kahlenberg, supra, at 1043, (quoting Bakke, 438 U.S. at 314, 98 S. Ct. at 2761 (1978)). Kahlenberg further notes that "[d]uring deliberations over the Bakke case, Powell emphasized in a letter to Justice Brennan that 'the judgment itself does not go beyond permissible use of race in the context of achieving a diverse student body at a state university.'" Kahlenberg, supra at 1043 (citing Bernard Schwartz, Behind Bakke: Affirmative Action and the Supreme Court 139-40 (1988)).

Thus, the concept of diversity as a compelling state interest is questionable in the higher education arena. More importantly, there is no direct precedent for extending the doubtful rationale to the K-12 level, or anywhere beyond higher education. See Bibliography #2, which contains a bibliography of legal and educational articles discussing the use of race-based measures in education.

c. Increasingly, school districts are facing litigation on the use of racial quotas, set asides, and racial ceilings.

Several recent state-court opinions indicate that the use of racial quotas to maintain a certain degree of racial balance in the K-12 setting, absent a remedial obligation will likely not be constitutional. In Equal Open Enrollment Ass'n v. Board of Education, 937 F.Supp. 700 (N.D. Ohio 1996), a federal district court in Ohio considered a district policy which prohibited white students from taking advantage of Ohio's open enrollment law. The rationale used to justify this policy was the need to prevent racial imbalance which might result if white students were allowed to leave the district. The question before the court was whether the "prevention of imminent racial segregation is a compelling state interest." Id. at 705. The court noted that "absent a finding of past discrimination, no race-based regulation has been upheld." Id. at 706 (citations omitted). The court further noted that even if this could be recognized as a compelling state interest, the policy in question was not narrowly tailored to achieve the interest. Thus, the policy was struck down. In McLaughlin v. Boston Sch. Comm., 938 F.Supp. 1001 (D. Mass. 1996) the court granted a preliminary injunction under the Fourteenth Amendment to enjoin the Boston Latin School from denying admission to a white student based on its 35% set-aside for black and Hispanic students. That preliminary injunction was reversed in Wessmann v. Boston School Committee, 996 F.Supp. 120 (D. Mass. 1998). However, in an opinion released only a few days ago, the 1st Circuit reversed the district court, and declared the race-based set-a-side unconstitutional. The court found that since the district had been declared "unitary" several years before, the quota was not related to the compelling governmental interest of remedying past discrimination. In strong language, the court also denounced the notion that racial balancing was itself a compelling state interest sufficient to justify racial set-a-sides and quotas. Wessman v. Gittens, 1998 W.L. 792148 (1st Cir., Nov. 19, 1998.)

At the time of writing this document several districts are being challenged in court based on their use of racial quotas to achieve diversity. In Tito v. Arlington County Sch. Bd., No. 97-540–A (E.D. Va., May 13, 1997) a federal district court struck down race-based preferences in the admissions process for certain alternative schools. The U.S. Court of Appeals for the 4th Circuit is considering an appeal from that decision. See Caroline Hendrie, Justice Supports Diversity Appeal, Education Week on the Web, September 9, 1998. Ms. Hendrie notes, "The case is being watched in desegregation circles nationwide." Id.

In Roe v. Houston Independent School District, parents challenged the Houston School District's use of race in selecting students for its gifted and talented program. See Ex. 19 (complaint filed in the suit.) The suit was settled when the district agreed to drop the system that was based on achieving a ratio of 65% Blacks and Hispanics to 35% students of other groups. See Caroline Hendrie, Houston Reaches for Diversity Without Quotas, Education Week, June 10, 1998 at 11.

Similarly, the San Francisco School District was forced to modify their procedures for admitting students to a highly sought after school after a group of Chinese Americans filed a suit arguing that they had to score higher on entrance exams than other groups. See Caroline Hendrei, New Magnet School Policies Sidestep an Old Issue: Race, Education Week, June 9, 1998 at 10-12. The case was set to go to trial on September 22, 1998. See Ho by Ho v. San Francisco Unified School District, 147 F.3d 854 (9th Cir. 1998). Other similar challenges have arisen in Buffalo; Charlotte-Mecklenberg, North Carolina; Dekalb County, Georgia; Louisville and New Orleans. Hendrie, "New Magnet Schools Policies Sidestep on old Issue: Race," supra. But see Hunter v. Regents of the Univ. of California, 971 F.Supp. 1316 (C.D. Cal. 1997) (holding that "use of racial and ethnic identity criteria" in elementary school admissions was "narrowly tailored to serve the purpose of a compelling state interest").

These challenges are strong indications of the type of litigation which boards and districts may be facing if they continue to use student assignments which are strictly race-based. See also Courtney A. Hueser-Stubbs, Hopwood v. Texas: Ramifications and Options for University Affirmative Action Programs 65 UMKC L. Rev. 143, 155 (1996) ("in the wake of the Hopwood decision nearly all legal analysts agree that the most obvious impact will be increased litigation"); Peter Van Tyle, The Other Shoe Drops: Courts Make College Admission a "Risky Business," Community C.J., Jun. 1996, at 28; David Shimmel, Is Bakke Still Good Law? The Fifth Circuit Says No and Outlaws Affirmative Action, 113 Ed. L. Rptr. 1052 (1996); Caroline Hendire, Without Court Orders, Schools Ponder How to Pursue Diversity, Education Week, Apr. 30, 1997, at 1; Erica J. Rinas, A Constitutional Analysis of Race-Based Limitations on Open Enrollment in Public Schools, 82 Iowa L. Rev. 1501, 1503 (1997) ("At present, no unitary school district should feel confident that an open enrollment plan that limits participation on the basis of race would survive an equal protection challenge.")

The concern with using racial quotas is not only that lawsuits will be brought, but more importantly that it is highly doubtful that such suits can be won. This trend is clearly evidenced by the K-12 cases and literature cited above. If a new rule were to use or promote the use of racial quotas, it is unlikely that such a policy would survive a legal challenge. If that were to

happen and the rule were struck down, efforts to achieve greater integration would be dealt a real blow on many levels.

Furthermore, given the litigation about the extent to which race can be a factor in school admissions, the Supreme Court could issue a decision in the area in the next few years. The rule must be drafted with enough flexibility to accommodate a limited holding by the Court; this rule does that.

d. Minnesota's Human Rights Act and race-based assignments.

This State's Human Rights Act arguably provides another reason to eliminate reliance on the use of racial quotas. Minn. Stat. §363.03 subd. 5 (1996) provides in pertinent part as follows:

> It is an unfair discriminatory practice:
>
> (1) To discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race. . . .

Discriminate "includes segregate or separate". Minn. Stat. §363.03 subd. 14 (1996). This language suggests that an act by an educational institution to deny a student educational benefits solely based on race (such as the right to attend a particular school) would be prohibited, even if it were for the benign purpose of creating additional diversity in the student population.

However, there is another provision in the Act itself that qualifies the prohibition above. That section states:

> Nothing in this chapter shall be interpreted as restricting the implementation of positive action programs to combat discrimination.

Minn. Stat. §363.12 subd. 1(5)(1996). There has been no litigation under the Human Rights Act concerning whether race-based assignments for benign purposes are acceptable, so it is difficult to predict how the statute might be construed. Given the uncertainty, it is reasonable to curtail the use of race-based assignments. Moreover, any Minnesota holding would be subject to the limitations of the 14th Amendment and the Supreme Court's ultimate ruling on whether diversity is a compelling state interest.

e. Conclusion: the present state of case-law and statutory law strongly suggests that a rule which uses racial quotas as a means of achieving integration is no longer reasonable.

The current rule does not distinguish between intentional acts of segregation and racial imbalance; it also does not require the State to make a finding of intentional discrimination before imposing race-based remedies, including race-based student assignments. In fact, over the years, districts have used race-based remedies, such as quotas, in attempting to comply with the formula imposed by the present rule.

Given the dramatic changes in the holdings of the Supreme Court, circuit courts and district courts over the past seven to eight years, there is a serious question whether the imposition of a strict numerical definition of segregation, followed by the use of a race-based remedy, such as student assignments based solely on race, or racial quotas at schools, would be sustained. At a minimum, such quotas would subject districts and perhaps the State to expensive litigation.

Thus, the current rule, which relies to a great extent on quotas to achieve compliance, is no longer workable and it is necessary that it be repealed. Because the proposed rules encourage integration without using racial quotas, they are both needed and reasonable.

IV. STATEMENT OF REASONABLENESS FOR PROPOSED RULES

In preparing these proposed rules, the State Board of Education and the Commissioner of Children, Families & Learning sought information, input and advice over a span of nearly 8 years. The reasonableness of these rules rests for the most part on four major points.

1. The ongoing involvement of stakeholders in Minnesota in the multi-year development of the proposed rules. The involvement occurred in an ongoing and consistent process structured around advisory groups, the Desegregation Roundtable, the State Board of Education and the Department of Children, Families & Learning for gathering, and reviewing suggestions, input and information, for conducting public meetings, and for developing and recommending policy. This involvement in the development process is described in this Section.

2. The fact that the provisions in the proposed rules remedy the problems and issues identified in the current rules and remedy the reasons identified as evidence for the need for a change in the current rule, specifically changing demographics and changing caselaw as discussed in Section III. These statements of reasonableness appear throughout this document and specifically in Sections III and V.

3. The fact that the proposed rules are consistent with the most recent U.S. Supreme Court caselaw and federal and state caselaw. Analysis of this caselaw appears throughout this document.

4. The fact that the proposed rules are consistent with recent sociological literature regarding the effects of desegregation/integration. This analysis appears particularly in Section V., Appendix B., and throughout the document generally.

A. Stakeholder Involvement

Stakeholder involvement has been nearly continuous since 1990 when the State Board convened the Desegregation Policy Forum. This forum had a membership of 25 representatives of key stakeholder groups and issued a report in 1990 to the State Board.

The State Board conducted two sets of statewide public meetings: 12 in 1991 and another 12 in 1992 to inform the public of the proposed policy and receive public input. These statewide public meetings provided open forums for parents, students, and community members as well as educators.

The Desegregation Roundtable was established in 1993 by legislation and met over a period of three years to formulate extensive recommendations on desegregation/integration for the State Board. The composition of the Desegregation Roundtable membership (53 members) represented communities and groups representing those who would be affected by the proposed rules. A final report to the State Board of Education and State Legislature was submitted in February 1994.

Between April and June 1995, the State Board of Education, the University of St. Thomas and the Institute on Race and Poverty at the University of Minnesota co-sponsored a Forum Series on School Desegregation; there were three forum events attended by a total of 295 individuals. A report summarizing major issues, finding and areas of consensus and desegregation was published in September 1995.

In late 1995 through early 1996, the Minnesota Minority Education Partnership, in cooperation with the State Board held a series of community forums which engaged community members around the metro-area on issues of desegregation. Those forums specifically included discussion of the desegregation rule.

In the ongoing discussion and development of policy and the proposed rules, the State Board had an agenda item on desegregation issues and the proposed rules on its regularly scheduled monthly meeting 67 times in the seven-year period between 1990 and December 1997.

In May 1996, in addition to its monthly Board meetings the State Board held two public meetings to specifically discuss the desegregation rule and the changes made since the Roundtable drafts. From spring 1996 until December 1997, individual board members and representatives of the Board met with the Desegregation Advisory Committee and St. Paul and Minneapolis District representatives several times to discuss the rules as they were being developed.

In addition, State Board of Education members and DCFL staff held several meetings with representatives of the Minnesota Indian tribes in 1996 and 1997. The input from these meetings is reflected in the provisions for American Indian students in the proposed rules.

A Notice of Intent to Solicit Outside Information and Opinions was published by the State Board in the March 13, 1995 State Register. On March 18, 1998, a second Notice of

Request for Comments on Planned Rules Governing Desegregation/Integration was published in the State Register to comply with the newly amended chapter 14 requirements.

After the transfer of rulemaking authority, the Commissioner of the Department of Children, Families & Learning published another Request for Comments in the October 5, 1998 State Register. The October 5, 1998 Notice of Request for Comments was mailed to all who registered with the State Board and all who registered with the DCFL to receive notices of rulemaking, and in addition, the Notice was mailed to all superintendents of public schools, 68 state education agencies, councils and associations, including MN Congress of Parents, Teachers, Students, MN School Boards Association, MN Education Association/MN Federation of Teachers; to the Council of Black Minnesotans, the Asian-Pacific Council, the Indian Affairs Council, and Latino-Chicano Council; to the Desegregation/Integration Advisory Board members, the West Metro Education Partnership Joint Powers Board, and to the members of House and Senate Education committees. All comments received were reviewed and considered in the development of the proposed rules.

Finally, during the summer and fall of 1998, the Commissioner convened meetings with the Desegregation Advisory Board and various groups that would be affected by the proposed rules including 16 school districts in southwest Minnesota, and 18 school districts in the metro area. The Commissioner also presented the provisions of the proposed rules relating to desegregation to an Issue Forum sponsored by the Minnesota Minority Education Partnership and The Urban Coalition to provide information on the proposed rules and their effect on districts and on stakeholders and to receive comments.

V. STATEMENT OF NEED AND REASONABLENESS FOR THE PROPOSED RULES: SUBPART–BY–SUBPART

A. RULE: 3535.0100. PURPOSE.

The purpose of parts 3535.0100 to 3535.0180 is to:

A. recognize that there are societal benefits from schools that are racially integrated as the result of the voluntary choice of parents and students, while also recognizing that many factors beyond the control of the commissioner and the control of districts, including housing, jobs, and transportation, can impact the ability to racially integrate schools;

B. prevent segregation, as defined in part 3535.0110, subpart 9, in public schools;

C. encourage districts to provide opportunities for students to attend schools that are racially balanced when compared to other schools within the district;

D. provide a system that identifies the presence of racially isolated districts and encourage adjoining districts to work cooperatively to improve cross-district integration, while giving parents and students meaningful choices; and

E. work with rules that address academic achievement, including graduation standards under chapter 3501 and inclusive education under part 3500.0550, by providing equitable access to resources.

This part is necessary and reasonable because it gives an overview of the policies that underlie the proposed rules.

First, it recognizes that there are important policy reasons for encouraging integration. Two social scientists have recently observed:

> Much of the attention in the early post-Brown period, following the initial massive-resistance response, was centered around the question of whether school desegregation would have positive or negative effects on academic achievement, self-esteem and interracial attitudes on Blacks and Whites.[18] More recent attention has turned to an examination of desegregated schooling's impact on long-term outcomes, including its effects on career attainment and adult social roles.

Marvin P. Dawkins & Jomills Henry Braddock II, The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society, 63 Journal of Negro Education 394 (Summer 1994).

Braddock and Dawkins reviewed several studies which they conclude indicate long-term benefits to African-American children who attended desegregated schools. They describe studies which "tend to show that desegregation of schools leads to desegregation in later life including areas that are important to career attainment"; and evidence that indicates that elementary and secondary school desegregation has a positive influence on the enrollment of African-Americans in predominately White colleges and universities. Id. at 401. Other benefits of desegregation described by these authors is that greater desegregation in high school contributes to the development and persistence of plans by African-Americans to enter professional occupations in fields where they are underrepresented; moreover, greater integration in K-12 grades may be correlated to greater integration in the workplace later on. Id. at 401-03. See also Book Note, The Desegregation Dilemma, 109 Harv. L. Rev. 1144 (1996).

Some of the more concrete benefits discussed above may be debated by sociologists (see generally, Janet Ward Schofield, School Desegregation and Intergroup Relations: A Review of the Literature, vol. 17, Review of Research in Education 335 (1991), and the numerous studies

[18] There has been a great deal of debate surrounding these earlier assumptions about the benefits of desegregation; the greatest debate seems to have focused on whether desegregation had a positive effect on the academic achievement of students of color. See Bibliography 3 for a listing of much of the research in the area. See also discussion in App. B.

cited therein); Walter G. Stephan, The Effects of School Desegregation: An Evaluation 30 Years After Brown, Advances in Applied Social Psychology, 181 (Michael J. Saks & Leonard Saxe, eds., 1986). However those benefits are qualified and measured, clearly integration can lead to greater understanding of and respect for people of all races. Schofield, Id. Thus, the Commissioner's policy reaffirms the need to strive for the benefits that desegregation/integration efforts can bring.

Second, the purpose statement reaffirms the holding of Brown v. Board of Education, which was that equal educational opportunities cannot be provided if students are mandatorily segregated by the government on the basis of race. It states clearly the Commissioner's commitment to eliminating intentional, discriminatory conduct that results in segregation.

The purpose statement also recognizes that while school desegregation is important, there are many factors which impact the ability of the Commissioner and local districts to overcome racial imbalances. Obviously, demographic changes, which leave inner cities racially isolated are issues over which the Commissioner has no direct control. In spite of external limitations, the Commissioner is committed to taking positive steps to improve integration both within districts and across district lines. The rule recognizes the importance of student and parental choice in this area as well as stressing the importance of other rules as they work together with this rule.

B. RULE: 3535.0110. DEFINITIONS.

Subpart 1. Scope. As used in parts 3535.0100 to 3535.0180, the terms defined in this part have the meanings given them.

This part is needed and reasonable because it informs readers of the exact meaning of terms used throughout these proposed rules.

RULE DEFINITIONS (Continued)

Subp. 2. Enrolled American Indian students. "Enrolled American Indian students" means students who live on or off a reservation and are enrolled in a federally recognized tribe. Enrolled American Indian students have dual status as protected students under subpart 4 and members of sovereign nations.

This provision is needed to recognize that enrolled American Indian students are not only students in a protected class but also members of political groups which are recognized as sovereign nations.

It is also reasonable to define "enrolled American Indian students" in a category separate from other students protected by the rule, to indicate that such students have a different legal status for some purposes. Such recognition is reasonable, because it is consistent with both federal and state court decisions which recognize the dual status of American Indians enrolled in

a federally recognized tribe as members of both racial and political groups. [19] See, e.g., Morton v. Mancari, 417 U.S. 535, 553 n.24, 94 S. Ct. 2474, 2484 n.24 (1974); Booker v. Special School District No. 1, 451 F.Supp.659, 667-68 (D. Minn. 1978), aff'd 585 F.2d 347 (8th Cir. 1978), cert. denied, 443 U.S. 915 (1979); Jill Gavle v. Little Six, Inc., 555 N.W. 2d 284 (Minn. 1996) (citing Getches, et al., Cases and Materials on Federal Indian Law 8 (3d ed. 1993)).

It is important to note that there is no consistent definition of the term "American Indian." "There is no single statute that defines 'Indian' for federal purposes . . . . Some people therefore can be an Indian for one purpose but not for another." Felix S. Cohen, Handbook of Federal Indian Law 23, 26 (1982 ed.) (hereinafter "Cohen at ---".) Cohen further states that "recognizing the diversity included in the definition of Indian, there is nevertheless some practical value for legal purposes in a definition of Indian as a person meeting two qualifications: (a) that some of the individual's ancestors lived in what is now the United States before its discovery by Europeans, and (b) that the individual is recognized as an Indian by his or her tribe or community." Cohen at 19-20 (emphasis added). "The basic concept of 'retaining tribal relations,' however, continues to be manifested in the notion that normally an essential element of Indian status is a relationship with an Indian tribe." Cohen at p 23. See also Booker, supra at 668 "(when considering whether a classification is political) the law or practices in question were closely related to furthering the federally recognized interests of political sovereignty and tribal self-government and the classifications consequently depended on tribal membership or proximity to reservations. . . ." (emphasis added.)

Requiring membership in a federally recognized tribe is a reasonable requirement of this definition, because it is consistent with the cases and treatises above which suggest that an important component to the definition of "American Indian" in a political sense is a definitive connection to one's tribe. It is also consistent with various federal definitions, including 20 U.S.C. §7881 (Supp. 1998) and 25 C.F.R., §273.2(j) (1995). See also Ex. 20, p. 14 (Indian School Councils' Prel. Report to the Minn. State legislature, 1988).

RULE DEFINITIONS (Continued):

Subp. 3. Commissioner. "Commissioner" means the commissioner of the Department of Children, Families, and Learning.

This definition is needed in order to advise districts where to send information required by the rule and to inform districts of the official who has authority for enforcing the desegregation rule. The rule is reasonable because under Minn. Stat. §124.15 subds. 2, 3, and 4 (1996), as amended by and 1998, ch. 397, art 4, §§18-24, the Commissioner[20] is given the

[19] The concept of "sovereignty" as it applies to American Indian people is a complex one and has been the subject of a great deal of litigation. A detailed discussion of the issue is contained in Section V.G.2.

[20] The "Commissioner" referenced in the legislation originally enacted at Minn. Stat. §124.15 was the Commissioner of the Department of Education; the title of that agency has changed (it is

authority to undertake a process for reducing State aid for "noncompliance with a mandatory rule of general application promulgated by the State Board in accordance with statute in the absence of special circumstances making enforcement thereof inequitable, contrary to the best interest of, or imposing an extraordinary hardship on, the district affected. . . ." This provision therefore implements the statutory framework for rule enforcement.

RULE DEFINITIONS (Continued):

Subp. 4. Protected Students. "Protected students" means:

A. students who self-identify or are identified in the general racial categories of African/Black Americans, Asian/Pacific Americans, Chicano/Latino Americans, and American Indian/Alaskan Native; and

This subpart is necessary to enable the Commissioner and districts to determine which students fall into protected classes for purposes of determining whether racial discrimination has occurred. The reference is this subpart to African/Black Americans, Asian/Pacific Americans, Chicano/Latin Americans and American Indian/Alaskan Native is reasonable because it is consistent with the groups identified as "minority students" in the previous rule and therefore provides continuity for users of the rule. The groups are also consistent with (although not identical to) the new racial/ethnic categories used by the Federal Government. See Office of Management and Budget ("OMB") Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 F.R. 5878201 (1997). (Ex. 21)

RULE DEFINITIONS (Continued):

B. multiracial students who self-identify or are identified as having origins in more than one of the categories described in item A.

This subpart is needed because our society is becoming increasingly multiracial in nature. Many providing input on this rule argued that it is simply not accurate or appropriate to require students or their parents to self-identify or to be identified as having only one racial origin, if, in fact that is not the case. Furthermore, "[t]he failure to officially recognize mixed-race status can cause self-esteem problems including having to choose the race of one parent over another when racially identifying for official purposes, and relatedly, being forced to deny the reality of one's racial heritage." Kenneth E. Payson, Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People, 84 Cal. L. Rev. 1233, 1236 n.17 (1996) (hereinafter "Payson, Check One Box"). The author further notes, "For an analysis of identity issues affecting mixed-race persons, see generally James H. Jacobs, Identity Development in Biracial

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now called the "Department of Children, Families and Learning") but the authority of the Commissioner remains the same.

Children in Racially Mixed People in America, 190-206 (Maria P.P. Root ed., 1992); Phillip M. Brown, Biracial Identity and Social Marginality, 7 Child and Adolescent Social Work Journal, 319 (1990); Deborah J. Johnson, Racial Preference and Biculturality in Biracial Preschooler, 38 Merril-Palmer Quarterly 233 (1992); Kathy Overmier, Biracial Adolescents: Areas of Conflict in Identity Formation, Journal Applied Social Science v. 14, no. 2, 157 (spring/summer 1990)." The rule is reasonable because it enables the student, the parent or the guardian to more accurately indicate the student's individual and/or ethnic origins.

RULE DEFINITIONS (Continued):

Subp. 5. Racial balance. "Racial balance" means the increased interaction of protected students and white students within schools and between districts that is consistent with the purposes of parts 3535.0160 to 3535.0180.

The enabling legislation for this rule required the State Board of Education to "address the need for equal educational opportunities for all students and racial balance as defined by the state board." Minn. Stat. §121.11 subp. 7(d) (1996) (emphasis added). While the enabling legislation established the need for a definition of racial balance, it left entirely to the Board's discretion the manner in which the definition should be detailed and the rationale for the definition. The Commissioner's enabling legislation contains the same language. See 1998 Minn. Laws, ch. 398, art. 5, §7. It is, therefore, necessary to define the term "racial balance".

In reviewing the reasonableness of the definition proposed, it is important to remember one of the major purposes of desegregation. Most would agree that the essential reason for desegregation efforts in the educational context is to provide meaningful interracial contact for as many students as possible. For better or worse, this "meaningful interracial contact" has frequently been measured by whether schools are "racially balanced," i.e., whether a particular percentage of white/non-white students has been met. However, there are several difficulties with this approach to desegregation. First, there is no consistent definition of "racial balance" in caselaw; in actual implementation, school districts have used a wide variety of measurements to determine whether their classrooms are balanced. Moreover, requiring a particular degree of racial balance is difficult to sustain, in light of changing demographics. It also presumes that any "imbalanced" school is bad. Finally, requiring a certain degree of racial balance has sometimes led to white flight, which ironically defeats the entire purpose of desegregation—which is to maximize the opportunity for interracial contact. An analysis of all of these factors leads to the conclusion that while racial balance is a goal of integration, the ultimate question is whether desegregation efforts maximize the opportunity for interracial contact—not whether some magic, and perhaps arbitrary number in school buildings has been reached. This definition of racial balance is reasonable, because it is consistent with the underlying policy of these proposed rules which is to promote greater interracial contact. See also Section V.G. for a further discussion of the reasonableness of equating racial balance with the voluntary integration efforts detailed in proposed rule parts 3535.0160 - .0180.

RULE DEFINITIONS (Continued)

Subp. 6. Racially identifiable school within a district. "Racially identifiable school within a district" means a school where the enrollment of protected students at the school within a district is more than 20 percentage points above the enrollment of protected students in the entire district for the grade levels served by that school.

This definition is needed to clearly inform those affected by these proposed rules the exact "triggering" mechanism that the Commissioner will use to determine whether to inquire further into the causes of racial imbalance at a school or schools.

The 20% figure is reasonable because it is consistent with federal case law which has determined that a 15-20% figure is a "commonly accepted benchmark for determining whether individual schools are substantially disproportionate in their racial composition when compared to proportions of the races in the district as a whole," so as to enable the court to begin to analyze whether the racial imbalance is the result of intentional discrimination. Lee v. Geneva County Bd. of Educ., 892 F.Supp. 1387, 1394 (M.D. Ala. 1995); see also Milliken v. Bradley, 418 U.S. 717, 740-41, 94 S. Ct. 3112, 3125 (1974); Stell v. Board of Pub. Educ., 387 F.2d 486 (5th Cir. 1967); United States v. Yonkers Board of Education, 635 F.Supp. 1538 (S.D.N.Y. 1986), aff'd, 837 F.2d 1181 (2d Cir. 1987) cert. denied, 486 U.S. 1055 (1988); Diaz v. San Jose Unified School District, 633 F.Supp. 808 (N.D. Cal. 1985).

RULE DEFINITIONS (Continued)

Subp. 7. Racially isolated school district. "Racially isolated school district" means a district where the districtwide enrollment of protected students exceeds the enrollment of protected students of any adjoining district by more than 20 percentage points.

This definition is needed to clearly inform those affected by these proposed rules those conditions that will cause a school district to be required to follow the requirements of the proposed rules for racially isolated school districts.

This definition is reasonable both legally and demographically. In a legal sense, it is analogous to the judicial determination of when a school is racially identifiable, (i.e., when the difference between one district and an adjoining district is 15-20%) (see discussion in definition of racially identifiable schools above). Demographically, the number is reasonable because: a) it includes both urban and out-state districts; b) it targets districts which are physically proximate; and c) the total number of districts which will be considered racially isolated is a reasonable number.

RULE DEFINITIONS (Continued)

Subp. 8. School. "School" means a site in a public school district serving any of kindergarten through grade 12. For purposes of parts 3535.0160 to 3535.0180 only, school does not mean:

A. charter schools under Minnesota Statutes, section 120.064;

B. area learning centers under Minnesota Statutes, section 124C.45;

C. public alternative programs under Minnesota Statutes, section 124.17, subdivision 4;

D. contracted alternative programs under Minnesota Statutes, section 126.23;

E. school sites specifically designed to address limited English proficiency;

F. school sites specifically designed to address the needs of students with an individual education plan (IEP); and

G. secure and nonsecure treatment facilities licensed by the Department of Human Services or the Department of Corrections.

The first sentence of this subpart is needed to provide a definition for the types of school sites which are subject to the proposed rule. It is reasonable to limit the coverage of the rule to kindergarten through grade twelve public schools, because these are the schools over which the Commissioner has jurisdiction. See 1998 Minn. Laws ch. 398, art. 6, §5.

However, clauses A-G go on to exempt certain public school programs from the voluntary integration planning sections contained in parts 3535.0160-.0180. The programs exempted (charter schools; area learning centers; alternative programs; contracted alternative programs; sites specifically designed to address limited English proficiency; sites specifically designated to address need of students with IEP's; and secure and non-secure treatment facilities) are programs which are formed for students who may have needs that cannot or are not being met in standard school settings. In some instances, such as alternative programs, the site is offered to help with students who are at risk personally, educationally, or both. Given that these are not standard K-12 programs and are either optional or the result of parental or court placement it is reasonable to exempt them from planning aimed at integrating standard school sites. However, the Commissioner believes it is important to include these programs in initial data collection to ensure that students were not intentionally being assigned to these programs on the basis of their race.

RULE DEFINITIONS (Continued)

Subp. 9. Segregation. "Segregation" means the intentional act or acts by a school district that has the discriminatory purpose of causing a student to attend or not attend particular programs or schools within the district on the basis of the student's race and that causes a concentration of protected students at a particular school.

A. It is not segregation for a concentration of protected students or white students to exist within schools or school districts:

(1) if the concentration is not the result of intentional acts motivated by a discriminatory purpose;

(2) if the concentration occurs at schools providing equitable educational opportunities based on the factors identified in part 3535.0130, subpart 2; and

(3) if the concentration of protected students has occurred as the result of choices by parents, students, or both.

This definition addresses both what is and what is not segregation. This is necessary, from an implementation standpoint, 1) so that districts are on notice of those activities which will lead to enforcement; and 2) so that those responsible for enforcement have a clear understanding of the distinction between segregation which is intentional, and therefore actionable under the rule, and racial imbalance that requires voluntary rather than mandatory remedies.

This definition is reasonable because it is consistent with judicial definitions of segregation. Case law clearly distinguishes between acts which are intended to segregate, and therefore are unconstitutional, and racial imbalance which exists as the result of factors not intended or caused by the school district. For example, in Booker v. Special School District No. 1, 351 F.Supp. 799, 807-08 (D. Minn. 1972), the Federal district court defined segregation in this way: "(a) if the State and/or school administration has taken any action with a purpose to segregate, and (b) if that action has had the effect of creating or aggravating segregation in the schools of the District, and (c) if segregation currently exists, and (d) if there is a causal connection between the acts of the school administration and the current condition of segregation, then there is segregation which is imposed by law; and such is prohibited by the Fourteenth Amendment to the Constitution." Id. (citing Keyes v. School District No. 1, 313 F.Supp. 61, 73 (D.C. Colo. 1970)). Intentional acts which cause segregation are a violation of equal protection. Therefore mandatory remedies, which might include student reassignment or other race-based remedies, are permissible so long as they are narrowly tailored to correct the constitutional violation. See Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 91 S. Ct. 1267 (1971).

However, "segregation" under this rule does not include the mere presence of racial imbalance 1) which is not the result of intentional acts by a district, 2) at schools which are comparable educationally, and 3) when student attendance is the result of choices by parents, students, or both. This limitation on the application of the term "segregation" is reasonable because it is consistent with cases holding that 1) mere racial imbalance is not a constitutional

violation (see Swann, supra, 402 U.S. at 24, 91 S. Ct. at 1280 ("If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse."); ("The clear import of this language from Swann is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in 'each school, grade or classroom.'"), Milliken v. Bradley, 418 U.S. 717, 741-42, 94 S. Ct. 3112, 3125 (1974)); and 2) racial imbalance which exists not because of acts by a government entity (in this case, a school district), but rather by other causal factors is not a violation of equal protection (see Booker, supra.) Therefore mandatory remedies, which might include race-based remedies, are not appropriate. See Swann, supra.

Finally, this definition is needed and reasonable because the enabling legislation for the rule requires the Commissioner to address "racial balance." By defining when intentional segregation does and does not occur, the concept of racial balance has been addressed in a way that is consistent with federal constitutional requirements.

RULE DEFINITIONS (Continued):

B. In addition to the factors in item A, it is not segregation for concentrations of enrolled American Indian students to exist within schools or school districts:

(1) if the concentration exists as the result of attempting to meet the unique academic and culturally related educational needs of enrolled American Indian students through programs developed pursuant to the federal government's trust relationship with American Indian tribes or through an agreement with an American Indian tribal government; and

(2) the concentration exists as the result of voluntary choices made by American Indian parents, enrolled American Indian students, or both.

This subpart treats concentrations of enrolled American Indian students differently than other concentrations of protected students for purposes of determining whether concentrations of those students are the result of intentional segregation. Under this language, if 1) a concentration of enrolled American Indian students exists, 2) as the result of a program designed for their unique needs, 3) which originates through the Federal trust doctrine or a state contract, and 4) is voluntary, a finding of intentional segregation will not be made. The section is necessary, because many in the American Indian community believe strongly that American Indian students do far better academically if they are allowed to attend school together as a cohesive group. Thus, "culturally specific" programs, which meet the requirements of this section, will not trigger a review of whether such programs are intentionally discriminatory. The exemption is reasonable because it is consistent with the case law which permits differential and beneficial

status to American Indians as member of political groups.[21] Furthermore, the exemption is reasonable because it is consistent with the intent of Minn. Stat. §126.45, et seq., The American Indian Education Act of 1988.[22]

C. RULE: 3535.0120. DUTIES OF DISTRICTS.

Subpart 1. Report. A school district shall annually submit to the commissioner, concerning each school site within its district, a report that includes:

A. the racial composition of each school within its district; and

B. the racial composition of the grade levels served by each of the schools.

The report shall be submitted according to the Minnesota Automated Reporting Student System (MARSS) deadlines as established annually by the commissioner and noticed to all districts.

This subpart is needed because in order for the Commissioner to determine whether the racial imbalance which exists at a particular school requires further inquiry, it is necessary to obtain data about the racial composition of each school site and of the district as a whole. This section will enable the Commissioner to collect that data. It is reasonable because it is a continuation of the data collection and reporting which districts have been providing under the current rule for the past several years and will not cause undue burden.

RULE: 3535.0120 (Continued)

Subp. 2. Data collection. A district shall collect for all students except American Indian students in subpart 3, the information required in subpart 1 by using one of the following racial identification procedures in the following order:

A. parent or guardian identification;

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[21] Since the definition of "enrolled American Indian" is tied to membership in a tribe, there is strong argument that such a classification is political and only subject to the rationale basis test. See discussion on American Indian students, Sections V.B. and V.G.

[22] The policy section of that statute provides: "The legislature finds that a more adequate education is needed for American Indian people in the State of Minnesota. The legislature recognizes the unique educational and culturally related academic needs of American Indian people. . . . Therefore, pursuant to the policy of the state to ensure equal educational opportunity to every individual, it is the purpose of Sections 126.45 to 126.55 to provide for American Indian education programs specially designed to meet these unique educational or culturally related academic needs or both."

B. age-appropriate student self-identification, when parent or guardian identification is not an option;

C. if parent, guardian, or student self-identification methods are not possible, sight counts administered by the principal or designee, pursuant to written guidelines developed by the district.

This subpart is needed to give a statewide guideline for districts to use to gather the data required by the proposed rules. This subpart is based on the recommendations of the Desegregation Roundtable discussions (see Appendix B), and therefore, is reflective of stakeholder viewpoints. Moreover, it is reasonable because this type of identification is a means of ensuring reliability and consistency. Parent identification is the most reliable; age-appropriate identification is also reliable assuming the student is at an age where he or she can provide information about his or her racial origins. Sight counts are the least accurate means of reporting, and are therefore to be used only as a last resort

RULE: 3535.0120 (Continued)

Subp. 3. American Indian students. In districts where the American Indian population is ten or more students, the parent education committee under Minnesota Statutes section 126.51, subdivision 1, in consultation with the American Indian parents the committee represents, may select as their identification procedure one of the following:

(A) parent or guardian self-identification;

(B) the process for identification specified in United States Code, title 20, section 7881; or

(C) the racial identification procedure used by the district for other students.

This subpart is needed and reasonable because it is consistent with 1998 Minn. Laws ch. 397, art. 2, §149, (The American Indian Education Act) and 20 U.S.C. §7881. The former requires the involvement of parent committees in Indian education decision, and the latter provides permissible guidelines for identifying an individual as an American Indian. This subpart is also consistent with the Roundtable recommendations.

D. RULE: 3535.0130 DUTIES OF THE COMMISSIONER.

Subpart 1. Review of data. The commissioner shall review the data provided by a school district under part 3535.0120 within 60 days of its receipt. If the commissioner determines that there is a racially identifiable school within a district, or if the commissioner receives a complaint alleging that a district is engaged in acts of segregation, the commissioner shall request further information to determine whether the racial

composition at the school or schools in question results from acts motivated at least in part by a discriminatory purpose. The commissioner's finding of a discriminatory purpose must be based on one or more of the following except that the commissioner shall not rely solely on item D or E, or both:

The first part of subpart 1 is necessary to begin the process of review and enforcement. It gives the Commissioner 60 days to review the data submitted by the districts under 3535.0120, which, based on the Department's experience, is a reasonable period of time to accomplish this task administratively.

It also gives the Commissioner the ability to gather information if a person complains that a district has engaged in intentionally segregative acts. This provision is necessary because acts of segregation may not appear from a paper review of the concentrations of protected students at one school relative to another school. Since one important purpose of the rule is to identify and eliminate intentional acts of segregation, this portion of the rule extends beyond the report of district data to cover other possible forms of intentional segregation situations as well. Finally, subpart 1 is reasonable because it is consistent with the report and review process which has been used under the current rule for the past 23 years under the current rule.

This second part of this section addresses the criteria for determining whether the racial composition at a school exists as the result of a district's "discriminatory purpose". This requirement is needed because the rule prohibits intentional acts of segregation. See Section IV.B.4. In order to determine if a district has intentionally segregated, the Commissioner must decide whether a district acted with a discriminatory purpose. The Commissioner's review of district data and other information (discussed below) are needed to make this determination and ensure consistent review of similar conditions from district to district.

Subpart 1 also addresses whether the acts in question are motivated at least in part because of, but not merely in spite of, a discriminatory purpose. This factor is necessary because a finding of discriminatory purpose includes an element of malicious intent, not simply failure to act. See, e.g., Personnel Adm. of Mass. v. Feeney, 442 U.S. 256, 279, 99 S. Ct. 2282, 2296 (1979) (discriminatory purpose may be found if "the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of' and not merely 'in spite of,' its adverse affects upon an identifiable group").

Finally, the last sentence of subpart 1 places limitations on the Commissioner's findings of a discriminatory purpose. This qualification is reasonable because the U.S. Supreme Court has declared that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." Penick, 443 U. S. at 464, 99 S. Ct. at 2950. However, "disparate impact and foreseeable consequences, without more, do not establish a constitutional violation." Id.

RULE: **3535.0130 (Continued)**

A. the historical background of the acts which led to the racial composition of the school, including whether the acts reveal a series of official actions taken for discriminatory purposes;

This factor is reasonable because the U.S. Supreme Court has directed courts to examine the historical background, not just the end result, of decisions having a disparate impact on a protected class. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267, 97 S. Ct. 555, 564 (1997) ("[t]he historical background of the decision is one evidentiary source . . . [for] official actions taken for invidious purposes.").

RULE: **3535.0130 (Continued)**

B. whether the specific sequence of events resulting in the school's racial composition reveals a discriminatory purpose;

This factor is reasonable because the Supreme Court has held that the sequence of events preceding the existence of racial imbalance may "shed some light on the decisionmaker's purposes." Arlington Heights, 429 U.S. at 267, 97 S. Ct. at 564. This factor, coupled with other items listed, will help to determine whether the racial imbalance is due to intentional actions on the part of district officials.

RULE: **3535.0130 (Continued)**

C. departures from the normal substantive or procedural sequence of decision making, as evidenced, for example, by the legislative or administrative history of the acts in question, especially if there are contemporary statements by district officials, or minutes or reports of meetings that demonstrate a discriminatory purpose;

This information is reasonable because it forms another part of the inquiry that the Supreme Court has directed courts to engage in to determine whether decision makers have intentionally discriminated against a protected class. See Arlington Heights, 429 U.S. at 267, 97 S. Ct. at 564.

Requesting this information is reasonable because evidence of deviation from a pattern of decisions or decision-making procedures, combined with other factors in this subpart, will aid the Commissioner in determining whether there is intentional segregation in a district.

RULE: **3535.0130 (Continued)**

D. whether the racial composition of the school is the result of acts which disadvantage one race more than another, as evidenced, for example, when protected students are bused further or more frequently than white students; and

This factor is reasonable because it has been identified by the U.S. Supreme Court as one of the indicators of discriminatory purpose. Washington v. Davis, 426 U.S. 229, 240, 96 S. Ct. 2040, 2048 (1976) ("invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.")

RULE: **3535.0130 (Continued)**

E. whether the racially identifiable composition of the school was predictable given the policies or practices of the district.

This factor is reasonable because the U.S. Supreme Court has specified that foreseeability of district policies and practices is an issue to be considered in determining whether a district has engaged in intentional segregation. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465, 99 S. Ct. 2941, 2950 (1979) ("[a]dherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor . . . which may be considered . . . in determining whether an inference of segregative intent should be drawn.'") (quoting Penick v. Columbus Bd. Of Educ., 429 F.Supp. 229, 255 (S.D. Ohio 1977)).

RULE: **3535.0130 (Continued)**

Subp. 2. District information. In order to determine whether a racially identifiable school exists as the result of acts motivated by a discriminatory purpose, the commissioner shall request and the district shall provide the following information related to the factors described in subpart 1:

A. information about how students are assigned to schools within the district, including:

(1) for schools which have been newly added or renovated or if attendance zones have changed, a description of what the attendance zones were and what the racial composition of each zone was at the time the school was planned and added or renovated;

(2) a description of the assignment and transfer options at each of the schools serving the grade levels in question, and the outreach efforts that were made to ensure parents received information about and were able to understand the availability of those options; and

(3) a comparison of the racial composition of the attendance area of the school in question as it relates to the composition of the district as a whole;

B. a list of curricular offerings;

C. a list of the extra-curricular options available at each of the schools serving the grade levels in question;

D. a list that breaks down, by race and school, the teachers assigned to all of the schools serving the grade levels in question and, considering the average percentage of teachers of color in the district, an explanation of any concentration of teachers of color assigned at a school at issue;

E. a list that shows how the qualifications and experience of the teachers at the racially identifiable school compares to teachers at the sites which are not racially identifiable;

F. evidence that the racially identifiable school has been provided financial resources on an equitable basis with other schools which are not racially identifiable;

G. a comparison of the facilities, materials and equipment at the racially identifiable school with schools that are not racially identifiable;

H. information that would allow the commissioner to determine whether the extent of busing is disproportionate between white students and protected students; and

I. any nondiscriminatory circumstances that explain why a particular school has exceeded the districtwide enrollment of protected students by more than 20 percentage points.

This subpart is necessary for a variety of reasons. First, in order for the rule to function, the Commissioner must be able to determine whether racially identifiable schools (i.e., schools with a racial imbalance) exist because of intentional, discriminatory purposes, or whether they exist for other reasons. Gathering the data articulated in A-I, or additional data if the Commissioner decides that is necessary, will enable the Commissioner to make that judgment. It is a reasonable data list, because it is based on federal caselaw.

Furthermore, the enabling legislation for this rule requires the Commissioner to "address the need for equal educational opportunities for all students." This subpart of the rule is needed

to respond to the legislative directive that the need for equal educational opportunities be addressed.

a. Collecting this data is reasonable because these factors are based on federal case law.

The data being collected under part 3535.0130 will enable the Commissioner to determine whether schools are intentionally segregated. Requesting these data is reasonable because it mirrors the analysis courts use to determine whether racially identifiable schools are the result of intentional segregation. In Green v. New Kent County Sch. Bd., 391 U.S. 430, 435, 88 S. Ct. 1689, 1693 (1968), the U.S. Supreme Court articulated six factors courts should analyze in determining whether schools are racially identifiable as a result of intentional discrimination. These factors, known commonly as the Green factors, include the following: composition of student body; extracurricular activities; faculty; staff; facilities; and transportation. These are not to be considered an exhaustive list. In Green, the Supreme Court authorized an evaluation of "every facet of school operations." Id. The factors contained in A-H mirror the Green factors and are consistent with the type of information used by subsequent courts to evaluate whether racial imbalance is the result of intentional discrimination. The following is an outline of the data requested by the rule and judicial precedent for examining that data:

1. Information on attendance and construction policies: Green, supra; Booker v. Special School District No. 1., 351 F.Supp. 799, 808 (D. Minn. 19720; See also Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 96 S. Ct. 2697 (1975).

2. Information on curricular offerings: Curricular offerings, including the need for remedial education programs, have been ordered by several federal courts examining desegregation plans. See. e.g., Stell v. Board of Pub. Educ., 387 F.2d 486, 492, 496-97 (5th Cir. 1967); Hill v. Lafourche Parish Scho. Bd., 291 F.Supp. 819, 823 (E.D. La. 1967); Redman v. Terrebonne Parish Sch. Bd., 293 F.Supp. 376, 379 (E.D. La. 1967); Lee v. Macon County Bd. of Educ., 267 F.Supp. 458, 489 (M.D. Ala. 1967); Graves v. Walton County Bd. of Educ., 300 F.Supp. 188, 200 (M.D. Ga. 1968), aff'd, 410 F.2d 1153 (5th Cir. 1969); Plaquemines Parish Sch. Bd. v. United States, 415 F.2d 817, 831 (5th Cir. 1969); Smith v. St. Tammany Parish Sch. Bd., 302 F.Supp. 106, 110 (1969), aff'd, 448 F.2d 414 (5th Cir. 1971). See also Moore v. Tangipahoa Parish Sch. Bd., 304 F.Supp. 244, 253 (E.D. La. 1969); Moses v. Washington Parish Sch. Bd., 302 F.Supp. 362, 367 (E.D. La. 1969); Morgan v. Kerrigan, 401 F.Supp. 216, 235 (D.Mass. 1975), aff'd, 530 F.2d 401 (1st Cir. 1976), cert. denied sub nom. White v. Morgan, 426 U.S. 935, 96 S. Ct. 2648 (1976); Hart v.Community Sch. Bd., 383 F.Supp. 699, 757 (E.D.N.Y. 1974), aff'd, 512 F.2d 37 (2d Cir. 1975). Cf. Booker v. Special Sch. Dist. No. 1, 351 F.Supp. 799 (Minn.1972); United States v. Texas, 447 F.2d 441,

448 (5th Cir. 1971), stay denied sub nom., Edgar v. United States, 404 U.S. 1206, 92 S. Ct. 8 (1971); Milliken v. Bradley, 433 U.S. 267, 97 S. Ct. 2749 (1977).[23]

Additionally, in Freeman v. Pitts, 503 U.S. 467, 112 S. Ct. 1430 (1992), the Supreme Court indicated some willingness to consider quality of education measures, including the provision of educational resources such as teachers with advanced degrees and library books. Indeed, Green authorizes an evaluation of "every facet of school operations." Green, supra, at 435. Therefore, a comparison of curricular offerings is reasonably related to the goal of determining whether comparable educational opportunities are being provided.

3. Information on extra-curricular offerings: Green, supra.

4. Information on assignment of teachers by race: Booker, supra at 808; Green, supra; Rogers v. Paul, 382 U.S. 198, 200, 86 S. Ct. 358, 360 (1965) (students have standing to challenge racial allocation of faculty because "racial allocation of faculty denies them equality of educational opportunity").

5. Information on qualifications and experience of teachers: See Freeman v. Pitts, supra, and rationale under "b" below; United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1199-1200 (2d Cir. 1987).

6. Comparison of financial resources: See rationale under "b" below.

7. Comparison of facilities, materials and equipment: Green, supra; Yonkers, supra.

8. Information concerning whether busing policies disproportionately impact students of color: Green, supra; Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040 (1976); Arlington Heights, supra.

9. Explanation of whether there are nondiscriminatory reasons for the concentration of students of color at a particular school; this information is reasonable because it gives districts the opportunity to explain why the school in question may have higher concentrations of students of color which are unrelated to acts of segregation by the district. By gathering this information at the beginning of the process, the Commissioner is in a better position to evaluate whether there is a legitimate, non-discriminatory reason

[23] Many of these cases deal with remedial education programs. They are not cited to suggest remedial programs must be ordered, but rather are included to demonstrate that curriculum offerings are an integral part of desegregation evaluation.

for why a particular school has exceeded the 20% trigger. This information, together with the other data to be provided, will give a more complete picture of what is happening in the district and why.

b. The data are reasonably related to determining whether there are "equal educational opportunities" for all students.

The State Board's enabling legislation for this rule, Minn. Stat. §121.11 subd.7(d) (1996) stated "[I]n adopting a rule related to school desegregation/integration, the state board shall address the need for equal educational opportunities." The Commissioner's enabling legislation contains the same language. However, the legislation does not provide direction regarding how the concept of "equal educational opportunities" should be defined.[24]

As the following discussion indicates, there is no consensus among educators or jurists about what the concept means. Indeed, the notion varies from individual to individual and from context to context.

The proposed rules addresses the concept of "equal educational opportunity" in a manner that is consistent with the way in which the term is used in the desegregation context: that is, whether educational inputs, or resources, are being delivered on a comparable basis without reference to race. Given the lack of consensus about the definition and the variability of meaning from context to context, this is a reasonable approach to the mandate of the original enabling legislation.

i. In the educational context, there is no single definition of the term "equal educational opportunity".

Skeen v. State, 505 N.W. 2d 299 (Minn. 1993) is the most recent and definitive interpretation of the meaning of the Education Clause in the State's Constitution. In that case, plaintiffs challenged the State's finance system arguing (in part) that because different districts were able to raise more money than others, the Education Clause was violated. Id. at 308.

During the trial, which lasted 67 days, a variety of witnesses were called to testify about education and educational policy. Several of these were qualified as experts in the area of education policy.

Interestingly, there was no consensus among the education experts even from Minnesota, regarding the definition of "equal educational opportunity." A review of these experts' opinions is instructive.

One witness talked about the concept in terms of academic outcomes (see Ex. 22, testimony of Tedd Suss). Another, Dr. Thomas Melcher, an expert in school finance, described

[24] Indeed, the legislation is ambiguous as to whether the Board or Commissioner are even required to include the notion of equal opportunity in the rule; requiring the Board and Commissioner to "address" the concept might only have meant that the notion should be discussed as it developed the rule.

both a "horizontal" definition, meaning "equal treatment of equals," and a "vertical" definition, meaning "different treatment of unequals." (See Ex. 23, testimony of Thomas Melcher). Dr. Joel Sutter, who has experience in a variety of areas, including school district fiscal services, agreed with the statement that "equity remains an elusive goal." He testified that part of the difficulty with the concept is that "it is extremely difficult to quantify and define, and that also as with most important societal institutions, education has many competing goals." (See Ex. 24, testimony of Joel Sutter, pp. 116-117.) Another witness was not comfortable giving a definition (See Ex. 25, testimony of Mark Misukanis). Dr. Gilbert Valdez, Manager of Instructional Design at the Department of Education, noted "at least two major interpretations of equal educational opportunities . . . . Equal opportunity especially in desegregation is considered bringing people to the same level. In other words, your equal opportunity to meet a certain standard. The one that I think we use more in Minnesota is equal educational opportunity which means taking each child and moving them to their full potential. The equal opportunity is then not against a norm or national or state standard but against each child's potential." (See Ex. 26, testimony of Gilbert Valdez.)

One of the national experts who testified at the trial, James Guthrie, reviewed nine different definitions of "equal educational opportunity" previously articulated by another expert in the field, Arthur Wise. These included: 1) the "negative" definition, which holds that any two children of the same abilities should receive equivalent forms of assistance in developing those abilities, without regard to where they live (i.e., a "fiscal neutrality"); 2) the "full opportunity" definition, where "equality is achieved by allocating educational resources to each student until he reaches the limits imposed by his own capabilities"; 3) the "foundation" definition, used by the majority of the states, in which the state foundation program develops a satisfactory minimum offering expressed in dollars guaranteed to every student by state funds, making up the deficiency which cannot be raised through local taxes; 4) the "minimum attainment" definition, which Dr. Wise has described as one in which resources are allocated to every student until the student reaches a specified level of achievement; 5) the "leveling" definition, which requires resources to be allocated in inverse proportion to student abilities based on the assumption that some students are more able than others and the less advantaged should have a concentration of assets to allow equality of attainment; 6) the "competition" definition which allocates resources in direct proportion to student's ability, providing more resources to the more able; 7) the "equal dollar per pupil" definition which assumes that ability is an illegitimate basis for allocating resources and requires equal resources for each student; 8) the "maximum variance ratio" definition, where educational resources are allocated so that the maximum difference per pupil would not exceed a specified ratio: and finally, 9) the "classification" definition, which puts students into classes based on characteristics such as age and ability and then funds a suitable level of support for students in that category state-wide. See Ex. 27 (testimony of James Guthrie); see also Arthur Wise, Rich Schools, Poor Schools: The Promise of Equal Education Opportunity 143-59 (1968).

For purposes of the proposed rule, two important concepts emerge from this array of definitions. First, there is no unanimity regarding a definition of "equal educational opportunity;" in fact, some of the definitions, such as that which gives more or less money to students, depending upon their needs or abilities, seem contrary to any common understanding of "equal." Other definitions contradict one another. Moreover, as Dr. Guthrie pointed out in his testimony, no one definition is used consistently in the provision of educational services by any

state. For example, Minnesota uses part of many different definitions in its education funding. See generally Ex. 27.

The second important concept which can be distilled from these definitions is that a majority of them are based upon some notion of state funding: in other words, the concept is tied predominantly to what kind of financial inputs, the State is providing, rather than on what the educational outputs or results are. Likewise, it is the input form of measurement which the proposed rule incorporates.

ii. The education clause and the equal protection clause of the Minnesota Constitution require the provision of adequate educational inputs, without regard to race.

The term "equal educational opportunities" does not appear in the Minnesota Constitution; likewise, it is not to be found anywhere is Minnesota caselaw. The concept is not referenced in Minnesota Statutes, except in the Education Code (Minn. Stat. Ch. 120-129), and then only four times: Minn. Stat. §§120.173, subd. 6 (1996), as amended by 1998 Minn. Laws ch. 397, art. 2, §64 and 1998 Minn. Laws ch. 398, art. 2, §20; Minn. Stat. §121.11, subd. 7d (1996) (the State Board's enabling legislation for the proposed rule); Minn. Stat. §124.278, subd. 1 (1996) and Minn. Stat. §126.46 (1996). In none of those references is the term defined. Thus, neither state statutes, caselaw nor the state Constitution establish a specific definition which is required to be used to meet the mandate of the enabling legislation.

While the Minnesota Constitution does not contain the phrase "equal educational opportunities," it does establish the basis for determining what the State must do to deliver education in a constitutional manner. The Education clause of the Minnesota Constitution provides that:

> **Uniform system of public school.** The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.

Minn. Const. art XIII, §1 (hereinafter "Education Clause"). The Supreme Court in Skeen held that "the right of the people of Minnesota to an education is sui generis and that there is a fundamental right, under the Education Clause, to a 'general and uniform system of education' which provides an adequate education of all students in Minnesota." Skeen, supra at 315. Thus, to begin with, students are constitutionally entitled to an adequate education. Furthermore, the State is required to provide enough funds to ensure that each student receives an "adequate education and that the funds are distributed in a uniform manner." Id. at 318.

The Equal Protection Clause contains a further requirement for providing education in the state. That clause provides:

> No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.

Minn. Const. art. 1, §2 (hereinafter "Equal Protection Clause.") The Minnesota Supreme Court has recognized that the standard applied to claims brought under the state equal protection clause is the same as that applied to claims brought under the federal equal protection clause. Skeen, 505 N.W2d at 312 (citing AFSCME Councils 6,14,65 & 96 v. Sundquist, 338 N.W.2d 560, 569 n.11 (Minn. 1983)), appeal dismissed, 466 U.S. 933, 104 S. Ct. 1902 (1984). Thus, if one is a member of a suspect class such as race, the State cannot discriminate in the provision of services based on race, unless the State can show that it has a compelling state government interest. See Skeen, 505 N.W.2d at 3112.

Taken together, these constitutional provisions and caselaw indicate that the State is required to provide an adequate education to its citizens, which is funded pursuant to a general and uniform system of education, without regard to race. The constitution does not require any level of outcomes; nor does it require any particular funding mechanism.[25] Instead, it requires a general and uniform system that provides an adequate opportunity to receive an education. The further limitation contained in the Equal Protection Clause requires that those educational resources be provided in a non-race-based fashion.

iii. In the desegregation context, "equal educational opportunity" is often defined in terms of whether educational resources are equitably distributed and accessible without regard to race.

As previously indicated, the concept of an "equal educational opportunity" varies depending upon the context in which it is being used. In federal law, federal desegregation cases, and in one seminal study conducted on equal educational opportunities, the term has been used to measure whether students are receiving educational resources (i.e., "inputs") on an equitable basis without regard to race.

20 U.S.C. §1701(a) declares that it is the ". . . policy of the United States that—(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race. . . ." Section 1703 defines not what equal educational opportunity is, but rather how it is denied:

> No State shall deny equal educational opportunity to an individual on account of his or her race . . . by
>
> > (a) the deliberate segregation, by an educational agency of students on the basis of race. . . .
> >
> > (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system. . . .

[25] Indeed, the Skeen Court noted that it might be possible to devise an even fairer and more efficient system of education finance than that which was being challenged in the litigation. However, the Court stated that "any attempt to devise such a system is a matter best left to legislative determination", so long as the status quo was meeting the constitutional requirements. Skeen, 505 N.W.2d at 318.

Several lawsuits were brought pursuant to this legislation on the basis that intentional segregation was a denial of equal educational opportunity; some were specifically premised on the allegation that race-based assignments of faculty and students denied students equal opportunities. See, e.g., United States v. School Dist. of Ferndale, 577 F.2d 1339 (6th Cir. 1978).

Similarly, many Supreme Court and federal circuit court opinions consider whether facilities, faculty, curriculum, transportation and equipment are being provided on a equitable basis for students attending racially imbalanced schools. For example, in Missouri v. Jenkins, 515 U.S. 70, 115 S. Ct. 2038 (1995), one of the factors required by the district court to remedy the vestiges of past discriminatory conduct and the lack of educational equality was to order marked improvement in the quality of the facilities. Id. at 2056. Similarly, the Supreme Court in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 91 S. Ct.1267, 1277 (1971) noted that the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, bear directly on whether the equal protection clause has been violated. See also Kemp v. Beasly, 389 F.2d 178, 189 (8th Cir. 1968) ("Surely all recognize that quality of education for any student depends on many factors, not the least of which is the competence of his teacher" and further holding that an intentionally segregated faculty denies students equal educational opportunity); United States v. Texas Educ. Agency, 467 F.2d 848, 874 (5th Cir. 1972) ("Equal educational opportunity is constitutionally mandated; segregated education deprives the student of equal educational opportunity . . . . This is the teaching of Brown I and II"); United States v. Yonkers Bd. of Educ., 856 F.2d 7, 10 (2d Cir. 1988) (holding that an 80-year old facility to which 92% black students had been assigned was in an undesirable condition to serve as an effective elementary school and to afford equal educational opportunity); Morgan v. Kerrigan, 509 F2d 580, 597-98 (1st Cir. 1974), cert. denied, 421 U.S. 963, 95 S. Ct. 1950 (1975) (in addressing discriminatory faculty hiring and assignment practices, the Court held that "[t]heir cumulative effect was to isolate black students, black teachers and black administrators in a limited number of schools, thereby denying to those students the equal educational opportunity to which they are constitutionally entitled. . . .")

Shortly after passage of the Civil Rights Act of 1964, Congress ordered the Commissioner of Education to conduct a survey and make a report to the President concerning the lack of availability of equal educational opportunities for individuals by reason of, among other factors, race. The report which followed was a massive survey and study conducted by a team of social scientists led by James Coleman. In that 1966 report, entitled "Equality of Educational Opportunity" sociologists looked at a number of factors to measure equal educational opportunity, and a great many of them mirror the type of inputs typically reviewed by courts to determine whether schools are intentionally segregated. These included facilities, (including those associated with academic achievement at the time such as physics, chemistry and language labs); equipment, (including textbooks, and the number of books per pupil in libraries); programs, (including basic curriculum as well as extra-curricular activities such as debate and student newspapers); and faculty issues, (including whether teachers are all of predominantly one race, and what their experience and training had been). See generally James S. Coleman, et al., Equality of Educational Opportunity (Washington D.C.: U.S. Government Printing Office, 1966).

What these statutes, cases and studies suggest is that, in the desegregation context, it is very reasonable to evaluate "equal educational opportunity" in terms of whether students are receiving resources on an equitable basis, without regard to race.

iv. The rule as proposed reasonably addresses the concept of equal educational opportunity because it provides a manageable standard that is consistent with the state constitution and desegregation caselaw.

The entire purpose of parts 3535.0130 to .0140 is to determine whether students are being intentionally assigned to schools based on race, and whether, as a result, their facilities, teachers, equipment and transportation are unequal. Given the lack of a definition in state caselaw and constitutional law, given that the inputs measured are consistent with the Education clause of the Minnesota Constitution, and given the precedent in desegregation law for evaluating equal educational opportunity in this way, this subpart of the rule is reasonably related to meeting the mandate of the enabling legislation to "address the need for equal educational opportunities."

RULE: 3535.0130 (Continued)

Subp. 3. Integrated alternatives. If the enrollment of protected students at a school is more than 25 percent above the enrollment of protected students in the entire district, or if the enrollment of protected student exceeds 90 percent at any given school, whichever is less, the district must provide affirmative evidence to the commissioner that students in that school have alternatives to attend schools with a protected student enrollment that is comparable to the district-wide average.

This is a necessary and very important component of the rule. Since the rule does not prescribe racial percentages at every school, certain schools may become racially isolated not because of intentional acts, but because of demographic conditions beyond the control of the district. However, it is important that students in these schools have an opportunity to attend integrated settings so that they can access the benefits associated with such setting if they choose to do so. This portion of the rule requires that they be given such an option.

A school which is twenty-five percent or more above the district wide average is clearly beyond what courts have identified as "racially identifiable" (see discussion in Section V.B.6. above); similarly, if a school has a concentration of more than 90% protected students, the opportunities to interact with students in an integrated setting is not available. For students attending such schools, it is important to provide an option to attend integrated schools whether or not the home school is intentionally segregated. This will provide an important opportunity for increased integration, while leaving the ultimate choice of where to attend with parents and students. The rule is reasonable, because it gives districts flexibility in determining how to provide alternatives for students.

E. RULE: 3535.0140. RESPONSE OF DISTRICTS.

School districts shall respond to the commissioner's request for information under part 3535.0130 within 60 days of its receipt. If supplemental information is requested by the commissioner, the district must respond within 30 days of the receipt of the request.

It is necessary to require districts to provide the information requested in 3535.0130 so that the Commissioner has enforcement authority if the information is not timely provided. Sixty days is a reasonable period of time for the district to respond since all of the information is data that the district has in its possession. Thirty days is also a reasonable period of time to provide supplemental information.

F. RULE: 3535.0150. DEVELOPMENT OF PLAN FOR MANDATORY DESEGREGATION; ENFORCEMENT.

Subp. 1. District plan. If the commissioner determines that segregation exists, the district shall provide a plan within 60 days that proposes how it shall remedy the segregation. The plan shall address the specific actions that were found by the commissioner to contribute to the segregation. The plan shall be developed in consultation with the commissioner. If the commissioner rejects any or all of the plan, the commissioner shall provide technical assistance to help the district revise the plan. However, if the district and the commissioner cannot agree on a plan within 45 days after the original plan was rejected, the commissioner shall develop a revised plan to remedy the segregation that the district shall implement in the time frame specified by the commissioner.

This subpart is necessary because it provides the framework for correcting a finding by the Commissioner that a condition of segregation exists. First, the subpart requires that a finding of segregation be made by the Commissioner. This is based on the Commissioner's evaluation of the factors contained in section 3535.0130. If the Commissioner makes such a finding, the district must submit a plan which addresses how the segregation will be remedied; further, the plan must address the specific factors which were found to contribute to the segregated conditions. This is necessary and reasonable so that the district will remedy the particular activity which was found to constitute an intentional act of segregation. It will also enable the Commissioner and the district to work together to make sure that any race-based remedies are narrowly tailored to address the particular facts which gave rise to the constitutional violation. This step is required by equal protection analysis (see discussion in Section III.C.2., supra).

This new provision is more reasonable than the present rule. The present rule does not require the district to identify the factors which led to the condition of segregation; therefore, it is sometimes difficult to determine what can or should be done to cure the condition of segregation. Under the new rule, once the factors causing the segregation are isolated by the Commissioner, the Commissioner is in a far better position to determine what type of plan can effectively remedy the condition of segregation.

For similar reasons, it is necessary and reasonable for the Commissioner and the district to work together to formulate a plan. Once the Commissioner has determined that segregation exists, he or she has the information the district needs to determine what type of plan would best remedy the segregation. Further, if the Commissioner rejects the district's initial desegregation plan, it is reasonable for the Commissioner to work with the district to develop an alternative.

However, if the district proposes a plan which is rejected, and if, after working with the Commissioner, the district still does not propose a plan which is acceptable, it is reasonable for the Commissioner to develop a plan which the district must implement. This is necessary and reasonable because once a finding of intentional segregation has been made, the Commissioner cannot allow that condition to exist indefinitely; the Commissioner must be in a position to require a remedy for that condition in a way that is reasonable, but also expeditious. The rule gives the district a total of 105 days to propose an acceptable plan.

RULE: 3535.0150 (Continued)

Subp. 2. Remedy. If the commissioner has made a finding of segregation, student assignments based on race that are made to remedy the finding of segregation are permissible in a plan for mandatory desegregation, so long as they are narrowly tailored to remedy the act of segregation.

This section is necessary because it clarifies that race-based assignments used to remedy intentional segregation are permissible only if they are narrowly tailored. The narrowly tailored requirement derives from Supreme Court precedent concerning the use of race-based assignments to remedy past intentional segregation. The Supreme Court examines all racial classifications under strict judicial scrutiny, requiring that such classifications "serve a compelling governmental interest, and [are] narrowly tailored to further that interest." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S. Ct. 2097, 2117 (1995). Whether a district's race-based assignments are narrowly tailored will depend on the "necessity of the [proposed] relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; . . . and the impact of the relief on the rights of third parties." United States v. Paradise, 480 U.S. 149, 171, 107 S. Ct. 1053, 1066 (1987) (citing Sheet Metal Workers v. EEOC, 478 U. S. 421, 481 (1986)).

This section is reasonable because in order to be legally justifiable, districts' use of race-based assignments to remedy intentional segregation must be narrowly tailored.

RULE: 3535.0150 (Continued)

Subp. 3. Extension. The Commissioner may extend the time for response from a district under parts 3535.0140 and 3535.0150 if it would impose an undue hardship on the district, for example, if the information is not easily ascertainable or the plan requires a complex remedy that includes consultation with outside sources.

Subpart 3 of this section is needed because it gives additional flexibility by allowing the Commissioner to extend the time for response for good cause shown. This will provide an expeditious remedy, while at the same time providing flexibility to the district. It is reasonable to give some flexibility to districts in the event that collecting data or formulating a plan cannot be done in the time frames specified.

RULE: 3535.0150 (Continued)

Subp. 4. Enforcement of desegregation. If the district fails to submit data required by the commissioner, fails to provide or implement a plan to remedy the segregation, or fails to implement a plan developed by the commissioner as provided in subpart 1, the commissioner must:

A. notify the district that its aid shall be reduced pursuant to Minnesota Statutes, section 124.15;

B. refer the finding of segregation to the Department of Human Rights for investigation and enforcement; and

C. report the district's actions to the education committees of the legislature by March 15 of the next legislative session with recommendations for financial or other appropriate sanctions.

This subpart is necessary to put districts on notice that the Commissioner will take effective action to eliminate intentional acts of segregation. The types of violations specified (i.e. failure to submit data, failure to provide a plan and/or failure to implement a plan) are reasonable because each is critical to the process of evaluating whether a condition of segregation exists and in remedying one if it is found to exist.

This section is reasonable because it utilizes the spectrum of legislative enforcement options available to the Commissioner. Minn. Stat. §124.15 is the only direct statutory authority available to the Commissioner for violations of mandatory rules of general application. That law also requires the Commissioner to report discriminatory actions to the Department of Human Rights, which has jurisdiction over the discriminatory practices of educational institutions.

Finally, it is reasonable to report intentional acts of segregation to the legislature. The legislature is the body charged with the responsibility for funding school districts. Moreover, the legislature has far greater authority to impose sanctions and bring about change than does the Commissioner. Reporting this information to that body is a reasonable first step in enabling the legislature to pursue additional remedies.

G. RULE: 3535.0160 INTEGRATION OF RACIALLY IDENTIFIABLE SCHOOLS NOT THE RESULT OF SEGREGATION

1. Introduction

This section of the rule addresses racial imbalance that is not the result of intentional, discriminatory conduct. The rule provides that if a school is racially identifiable for reasons other than intentional acts by a district, the district must propose a plan which will promote integration using voluntary approaches within its schools.

This provision, which encourages integregrated school sites resulting from choice, is needed because even in the absence of intentional acts by governmental entities, many schools remain racially isolated. For example, recently Minneapolis School District submitted a desegregation plan under the current rules. The Commissioner reviewed the District's plan in great detail to make certain that the variance being requested complied with all procedural requirements of the rules and also to ensure that those schools with high concentrations of students of color were not the result of intentional discrimination. See generally Ex. 16. The Commissioner concluded that the racially identifiable schools which now existed within the district were not the result of intentional segregation by the district; nevertheless, one third of the elementary schools in the district were more than 15% above the district wide average for its students of color population. Several schools are at or predicted by the district to be more than 90% protected students within the next few years.

While these demographics are not representative of all of the districts in the state, they are nevertheless instructive. Because of a variety of factors beyond the control of a district, including housing patterns within a district, or decisions by parents to leave the school district or send their children to private schools, many schools will still be racially isolated even in the absence of intentional acts of segregation. As discussed above, (see Section V.A.) there are many societal benefits to racially integrated schools. Thus, the Commissioner believes it is necessary to encourage integration of these schools.

The reasonableness of addressing racial imbalance using voluntary methods and not racial quotas is discussed below.

a. There is no constitutional requirement to obtain a certain degree of racial balance, and there is no judicial definition of the concept.

Some think of the attainment of a certain degree of racial balance based on quotas or percentages as a legal requirement; however, this is not the case. It is important to recall that the cases which have been litigated, and which have resulted in court-ordered racial balance requirements, involve situations where districts intentionally maintained dual school systems; the requirement for a particular degree of racial balance grew out of the need to remedy the unconstitutional discrimination. Even in those cases, the Supreme Court did not require that all schools achieve and maintain a fixed degree of racial balance.

For example, in Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1, 24, 91 S. Ct. 1267, 1280 (1971), the Supreme Court reviewed a lower court order requiring a ratio of 71-29% non-white to white enrollment in the schools of the district to remedy a previously intentionally segregated school system. The lower court acknowledged that variation "from that norm may be unavoidable." Id. In analyzing whether this required a fixed balance within each school of the district, the Supreme court stated "[I]f we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole. . . We see, therefore, that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement." Id. See also Keyes v. Spec. Sch. Dist. No. 1., 413 U.S. 189, 93 S. Ct. 2686 (1973).

Even in those cases where a finding of illegal discrimination was made, there has not been uniformity in defining when desegregation (i.e., "racial balance") has been achieved. For example, in Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1, 91 S. Ct. 1267 (1971), the Supreme Court ordered that schools in the district differ by no more than plus or minus 10 percentage points from the system average.

Busing advocate Gary Orfield describes "desegregation" in this way:

> "No one has, for that matter, ever given a specific definition to "desegregation." Federal courts sometimes order desegregation of most segregated minority schools and recommend that schools adopt plans approximately reflecting the racial ratio of the district. All plans, however, allow some variance, and the Supreme Court has insisted that racial balance plans are not required. Federal and state courts have at times left a good deal of segregation in school systems.[26] In other words, the most that can possibly be required of school systems is that they approximate district-wide racial patterns in each school, but something less is almost always accepted and major pockets of segregation are sometimes left intact.

Gary Orfield, Must We Bus? Segregated Schools and National Policy, 135-136 (1978).

These cases and commentary demonstrate that there is no legal consensus regarding the definition of racial balance. By necessity, the definition will vary from circumstance to circumstance, depending upon the racial composition and demographic tendencies of the districts and school sites in question. In fact, it might be argued that attempting to use one standard for all purposes is not reasonable.

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[26] Northcross v. Board of Education, 466 F.2d 890 (6th Cir. 1972), cert. denied, 410 U.S. 926 (1973). In this Memphis case the court of appeals approved a plan leaving 21,000 black children in segregated schools. The Supreme Court declined to review the case, permitting this segregation to continue.

Actual practices of school districts also reveal a wide variance in the definition of racial balance. Dr. David Armor[27] has described the range of practices in school districts with desegregation plans this way:

> [A] national survey of desegregation plans by the U.S. Department of Education offers information on the frequency of various definitions for a desegregation school. . . .
>
> For those districts using numeric standards of some type, the range and variability of desegregation definitions are noteworthy. The frequency of permissible variances is shown in the following list (a 40-point variance would correspond to a plus or minus 20 percentage-point standard or a fixed range from 10 to 50 percent):

Variance Allowed	Percent of Districts
Over 40 percentage points	10%
40 percentage points	28%
30 percentage points	24%
20 percentage points	12%
10 percentage points	9%
No variance	18%

> Thus nearly 40 percent of school systems with quantitative standards for desegregation have an allowable variance of 40 percentage points or greater, and 60 percent have an allowable variance of 30 points or less.

Armor, Forced Justice, supra, at 159-60. Moreover, the remaining 45% of schools included in the survey reviewed by Dr. Armor did not define racial balance; instead, 12% use an absolute or fixed standard, and another 33% had no precise numeric definition of a desegregated school. Id. Thus, even in districts using a racial balance concept, there is no consensus on when "racial balance" has been achieved; more significantly, nearly one-half did not use a numeric definition of the concept.

b. Using a fixed numeric formula has proven to be unreasonable in implementation.

Another reason the proposed rule does not define racial balance in terms of a fixed racial quota is because such an approach statewide is not workable. In districts with greater

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[27] The information which follows was based on an article by Lauri Steel, et al., entitled Magnet Schools and Issues of Desegregation, Quality and Choice (Palo Alto: American Institutes for Research, 1993). The tabulation which appears in the quoted language were prepared by Dr. Armor. See David Armor, Forced Justice: School Desegregation and the Law, 160 n. 10 (1995).

concentrations of protected students, adherence to strict numeric formulae misses the goal of greater interracial contact. For example, in the Minneapolis school district, the K-6 enrollment of protected students is over 67.8%. Using the racial balance formula of the present rule (segregation occurs when a school site is 15 percentage points above the protected student enrollment district-wide), a school site could have as many as 82.8% protected students and still not be considered segregated. Given that the entire point of a desegregation rule is to encourage greater interracial contact, arguably a numeric definition of racial balance, which permits a school with nearly 83% students of color, is not reasonably related to the underlying policy goal.

Furthermore, the very concept of racial balance presumes a static population which, when moved around in the correct proportions, will achieve the perfect mix of an integrated student body. However, this is not at all the reality. Urban and out-state districts alike have experienced significant fluxes in population which seriously impact a district's ability to achieve and maintain racial balance. See Section III.B. above. This requires annual or semi-annual reassessment and reassignments to achieve a figure within the racial balance parameters. From a demographic standpoint, this has been very difficult for some districts to achieve and maintain, and has led to the use of district-wide quota systems.

c. Voluntary measures are arguably more effective in achieving racial balance, because they provide more chances for interracial contact.

Another policy consideration which bears on the reasonableness of a numeric definition of racial balance concerns the issue of white flight. The difficulty with defining "integration" totally in terms of racial balance is that it considers only the balance of a student population against the overall district total; however, if the district is losing a large number of white students, a school can be considered "racially balanced" with a student of color population as high as 65%, 70% or even higher. Therefore, an equally important and reasonable measurement of the effectiveness of desegregation plans has been to look at the "index of interracial exposure," which measures the percentage white students in the average school of an African American child. See generally Christine H. Rossell, The Carrot or the Stick for School Desegregation Policy: Magnet Schools or Forced Busing (1990). Obviously the more often white students leave a district, the less opportunity there is for white students and students of color to be exposed to each other. This approach to integration stresses the reasonableness of and need for examining desegregation plans not only for the racial balance they produce at a particular school, but also overall whether the desegregation plan being utilized maximizes or negatively impacts interracial exposure.

In order to gauge this impact, it is important to distinguish between types of desegregation plans and the policies which underlie them. In a recent article, sociologists Christine Rossell and David Armor describe the various desegregation models this way:

> [T]he debate over school desegregation alternatives is part of a larger debate in the field of public policy over whether government will achieve its goals more efficiently and effectively if it compels persons or agencies directly to perform in some way, rather than if it acts indirectly by establishing market or market-like

incentives that make the pursuit of self-interest consistent with the public interest. . . .

> As with other policy alternatives, school desegregation plans can be placed on a continuum from the command and control approach—that is, direct government regulation—to the market incentives approach—indirect government regulation. Mandatory reassignment or "forced busing" plans can be thought of as representing the command and control approach to school desegregation. . . . Voluntary plans, particularly those with magnet incentives, represent the market incentives approach to school desegregation . . . . Many analysts argue that not only is government more likely to achieve the desired goal if it can harness self-interest, it will do so more efficiently than with the command and control approach.

See Christine Rossell and David Armor, The Effectiveness of School Desegregation Plans, 1968-1991, American Politics Quarterly, 267 (July, 1996) (hereinafter School Desegregation Plans).[28] In districts with court-ordered desegregation, there have typically been two models: "mandatory" and "voluntary". In a mandatory system, racial quotas are used to achieve a certain proscribed degree of racial balance. Generally, mandatory plans rely on two techniques that require busing. "The first of these, pairing and clustering, involves combing two or more schools of different racial composition, usually in different parts of a city, so that all students attend one school for various grades. . . . The second technique, satellite zoning. . . consists of assigning a geographic area with a given racial makeup to a school with the opposite racial makeup." Id. at 278-79.[29]

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[28] The authors note that "only a few studies have specifically compared mandatory and voluntary desegregation plans. Even fewer have examined the effect of White flight on the extent of desegregation actually produced by mandatory and voluntary desegregation. The studies conducted before 1985 are by now outdated, since they are missing recent innovations in desegregation techniques. Several of the more recent studies have limited samples (Armor 1988; Rossell, 1990a, 1990b, 1994, 1995a; Wilson, 1985) whereas one other study (Orfield, 1988) has not only a small sample but also no control variables. . .. ." Id. at 269-270. However, the data discussed in this article is the result of a study commissioned by the U. S. Department of Education to examine the prevalence and characteristics of magnet schools and their impact on desegregation. The authors use the data collected in the survey, which "represents the largest national sample and most complete data on school desegregation ever assembled" to study the effectiveness of a variety of other desegregation techniques. Id.

[29] Gary Orfield, noted for his work in the desegregation arena, argues for a mandatory city-suburban desegregation plan, in part to avoid the white flight phenomenon. See Gary Orfield, Metropolitan School Desegregation: Impacts on Metropolitan Society, 80 Minn. L. Rev. 825 (1996). The proposed rule does not suggest this alternative, nor does this document attempt to examine the reasonableness of such an alternative. As Section V.H. (Introduction) indicates, the Commissioner does not have the authority to change school district boundaries so that city and suburban districts become combined. Furthermore, the Commissioner does not have the authority to order busing across district lines. Therefore, Mr. Orfield's suggestions are not within the power of this Commissioner to adopt.

The types of voluntary plans offered have evolved over time, as the authors note:

> One voluntary technique is a majority-to-minority program (M-to-M) in which students can transfer from a school in which their race is in a majority to a school in which their race is in a minority. The second voluntary technique is magnet schools, which are schools that attract students by offering special curricula not available in regular schools (e.g., computer science or performing arts); racial balance is attained by placing ceilings on the enrollment of each racial group to reflect the district's racial composition. . . .

Id. at 279.

Some plans now use a combination of these types. The authors of School Desegregation Plans describe the combination plan this way:

> The newest type of desegregation plan is called controlled choice, which combines elements of both mandatory and voluntary plans. In its purest form, all geographic zones are eliminated and parents are asked instead to list in rank order their choices of schools, which usually can include their current neighborhood school. The administration assigns students to a school in order to maximize choice, but also to maintain racial balance in each school. Although most parents receive their first, second or third choices, some students are mandatorily assigned to schools that were not chosen by enough students of various races to create racial balance. Another form of controlled choice leaves geographic zones in place, but places racial balance caps on each school so that new residents to the zone can attend the school only if they maintain or improved racial balance. If the quota for their race has been met in their neighborhood school, they have to choose another school. Most controlled choice programs also utilize magnet schools in order to enhance choices to schools that might otherwise remain segregated."

Id. at 279-80.

The findings of the authors in analyzing this comprehensive data set revealed the following conclusions:

> [d]istricts that have ever had a mandatory plan exhibit a 33% reduction in White enrollment over the period from 1968 to 1991, at least in comparison to those districts that never had a plan. This can be compared to the 27% White enrollment decline associated with having a controlled-choice plan. . . . Finally, having a voluntary-only plan is associated with a mere 2.9% White enrollment decline, and this effect is not statistically significant. . . .
>
> As previous research has suggested, these results indicate that the plans that do not produce significant White flight are voluntary plans that do not use mandatory reassignments. Although supporters of controlled choice have argued that such

> plans are primarily a type of voluntary plan, the fact that they do involve some mandatory reassignments, coupled with the fact that parents do not know for sure whether they will get their first choice, appears to be sufficient to produce significant White flight. . . .
>
> [V]oluntary plans that emphasize both choice and neighborhood schools can produce as much or more interracial exposure than mandatory reassignment plans.

Id. at 289, 298.[30] See also Christina H. Rossell, Controlled Choice Desegregation Plans, Not Enough Choice, Too Much Control?, v. 31 Urban Affairs Review, No. 1, pp. 43-76 (Sept., 1995).

Perhaps reflecting this sociological data, courts since the 1970s have been more willing to address the impact of white flight when evaluating desegregation remedies. Three Supreme Court Justices have noted that mandatory measures (which are often the result of numeric definitions of racial balance) can often be counterproductive to the goal of increased integration. Justices Powell, Stewart and Rehnquist stated in their dissent to a dismissal of certiori:

> It is increasingly evident that use of the busing remedy to achieve racial balance can conflict with the goals of equal educational opportunity and quality schools. In all too many cities, well-intentioned court decrees have had the primary effect of stimulating resegregation. The experience in Dallas during this litigation presents a striking illustration of this problem. If the District Court orders substantial additional busing, as the Court of Appeals apparently thinks it should, recent history suggests that the Dallas school district will be well on the road to the "separate but equal" conditions mistakenly approved in Plessy v. Ferguson. . . . Such an outcome is no less real or less regrettable when caused by courts with benign motives. The promise of Brown v. board of Education. . . .cannot be fulfilled by continued imposition of self-defeating remedies.

Estes v. Metropolitan Branches of Dallas NAACP, cert dismissed, 444 U.S. 437, 438-39, 100 S.Ct. 716 (1980) (Powell, J., dissenting).

Consequently, measures which utilize voluntary, rather than mandatory techniques, will have greater efficacy in terms of producing the opportunity for increased interracial contact

d. Absent mandatory busing and racial quotas, there are still effective ways to achieve a diverse population.

As the forgoing discussion and much of this document indicates, there are many reasons to abandon a rule that relies heavily a numeric formula in defining racial balance and to adopt a rule that uses non-quota incentives-based measures to achieve integration. First, it is highly doubtful that using racial quotas alone would be legal. See Section III.C. above. Second, relying

[30] Both Minneapolis and St. Paul School Districts have used controlled choice programs to comply with the current desegregation rule; both have experienced significant loss of white students. See Section III.A., supra.

on controlled choice plans, which has been typical of urban school districts attempting to comply with the present rule, can actually lead to greater white flight, thus decreasing the opportunities students of color and white students have to interact. Using a definition of racial balance that does not mandate formulae will lessen the need for quota-based compliance, which, in turn, will arguably lead to a more stable, integrated population.

Moreover, if school districts wish to employ something other than a strictly voluntary program to achieve diversity, this remains a viable option, as long as it is not race-based. For example, if a district wished to achieve diversity at its magnet programs, one possible option would be to reserve a number of seats for students from certain geographic areas or from schools which had a high concentration of students of color. In districts employing choice options, such as Minneapolis, another option might be to reserve a certain number of seats for students who did not receive their first, second or third choices the preceding year, or else who had to be bused a certain distance from their home. Since these children often tend to be children of color,[31] reserving seats for such students would achieve greater diversity in magnets without resorting to quotas. A third idea might be to reserve a certain number of seats for children who are at risk educationally.

Another idea, which has been used effectively in higher education to achieve diversity, is to give a preference to students from socioeconomically disadvantaged backgrounds. This amounts to a "class-based affirmative action."[32] The argument for using such preferences is that they do a far better job than racial quotas in achieving one of the ultimate goals of integration: equal opportunity. Mr. Kahlenberg argues as follows:

> Class based affirmative action does a better job of providing equal opportunity than either the current system of affirmative action or a policy of inaction. Class preferences will indirectly compensate for past discrimination, and provide a bridge to a color-blind future.

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[31] Minneapolis officials themselves expressed concern over the policy of first-come-first-serve in its choice program, because it disproportionately impacted students of color who tended to come into the district after the registration period. Because seats were already taken at the neighborhood school or at nearby magnets, these children often had to be bused great distances; sometimes siblings were attending several different schools around the city. See Findings of the Commissioner of Education, Ex. 16.

[32] Since 1991, the University of California at Berkeley has given such preferences to students, regardless of race or ethnicity. "In recent years, between sixteen and eighteen percent of the freshman class received a leg up in admissions, based on a disadvantage index measuring parental income, education, and occupation." Richard Kahlenberg further notes, "[s]ince the 1970's, Temple University Law School has given preference to 'applicants who have overcome exceptional and continuous economic deprivation'". Richard Kahlenberg, Class-Based Afirmative Action 84 Cal. L.Rev. 1037,1068(citing Temple University Law School Admissions Brochure, 1994-95 at 45). Kahlenberg argues that "[a]pplication of the class principle to elementary and secondary schooling should also be explored." Id.

> The first and major advantage to the class preference proposal is that it clearly and unambiguously advances the goal. . . . [of] equal opportunity. It is commonly acknowledged that if a child is born poor, she has less chance of getting ahead than a child born into the upper or middle classes—even if the poor child is just as naturally talented and hard working as her more advantaged peer. As Northwestern University sociologist Christopher Jenks has noted, "If we define 'equal opportunity' as a situation in which sons born into different families have the same chances of success, our data show that America comes nowhere near to achieving to it. . . . [T]he sons of the most advantaged fifth could expect to earn 150% to 186% of the national average, while the sons of the least advantaged fifth could expect to earn 56% or 67% of the national average.

Richard Kahlenberg, Class-Based Affirmative Action, 84 Cal. L. Rev. 1037, 1061 (citing Christopher Jencks, et al., Who Gets Ahead? The Determinants of Economic Success in America, 82-83 (1979)).

Kahlenberg cites another important problem with affirmative action which is race-based: preferences can and often do go to the most advantaged people of color, who because of an advantaged background can beat out their less privileged counterparts. Id. at 1061, (citing Michael Lind, The Next American Nation (1995)). To illustrate this important point, Mr. Kahlenberg notes that "[a]t Harvard, for example, seventy percent of African American students have professional or managerial parents. By contrast, under a class-based system, the African Americans who benefit will represent a very different group. They will be those who have faced very real class-based obstacles."[33]

Mr. Kahlenberg proposes several definitions of "socioeconomic disadvantage." These include a simple definition that looks at family income; a more "sophisticated" definition, which considers "the three main determinants of socioeconomic status, and what educators consider key factors in a child's academic achievement: parent's income, education and occupation." Id. at 1075-77.

A last definition looks at other influences, including the type of neighborhoods children come from (factors could include the number of households living in poverty, median family income, crime rate, or concentration of more than 33% of the families living in poverty) and family structure (single parent versus two-parent family). Id. at 1078-81.

Some of these considerations are fairly easy to implement at the K-12 level, such as children who come from neighborhoods with more than 33% living in poverty, or children living

[33] Besides the moral advantage of class-based preferences over racial preferences, there are also at least two important legal advantages. First, "class-based preferences are often described by members of the Supreme Court as a clearly constitutional alternative to racial preferences." Id. at 1064 (citing Croson, 488 U.S. 469, 509-10 (1989)). A second advantage is that trying a non-race-based remedy first is one requirement if a government entity ever attempts to try a race-based remedy. Id. at 1046; see also United States v. Paradise, 480 U.S. 149, 107 S. Ct. 1053 (1987).

in high crime neighborhoods. Others may require more administrative effort, but are certainly worth exploring.

If such measures were used effectively in magnets, this would ensure that students who live in racially isolated neighborhoods have an opportunity to attend integrated settings. Moreover, as Mr. Kahlenberg argues, because of their personal obstacles, these children more likely need the opportunity to attend schools with enhancements or to leave the effects of a negative environment.

e. Schools are not educationally unsound simply because of the absence of a majority of white students.

Even if some racially isolated schools remain under the proposed rule, this does not mean that the rule is unreasonable or ineffective; schools comprised predominantly of students of color are not inherently inferior. As indicated in Section III.A. above, the harm flowing from the segregated schools addressed in Brown was that the segregation was state-enforced. The noted sociologist James S. Coleman has described this important distinction as follows:

> This belief in the inherent inferiority of an all-black school has a curiously racist flavor. It originated, however, in the attempt by courts to establish a criterion for deciding whether a school district in the South that had maintained a dual system had in fact eliminated its dual system. In such a context, and in localities where there was little residential segregation, this rule of thumb was a reasonable one; the unreason came in elevating this rule-of-thumb criterion to a principle for judging the quality of the school. (The incorrectness of this belief in the inherent inferiority of the all-black school is perhaps a corollary to the incorrectness of the belief in extensive achievement benefits of school integration.)
>
> There is a difference between a school that is all black because black students have no opportunity to choose to attend another school and a school that is all black despite fact that its students can choose to attend other schools. Such choice is unfortunately still rare in most cities, but a black school that thrives in its presence is obviously not an inferior school. It is a school to which parents freely choose to send their children.
>
> There have been, and there are, all-black schools that are excellent schools by any standard. . . . There are numerous all-black elementary schools in which achievement levels are above grade level using national norms.
>
> It is important to recognize the error of the belief that all-black schools are educationally inferior. In the ethnically and culturally pluralistic society of the United States, there will be schools of all sorts; schools which are racially integrated but also schools that are all black, just as there are schools that are all white. What is essential, as I indicated earlier, is that if a child is in an all-black school, it should be because he wants to be there and because his parents want

him to be there, not because it is the only school that he has a reasonable chance to attend.

James S. Coleman, New Incentives for Desegregation, v.7, no. 3 Human Rights 10, 14-15 (Fall 1978).

Indeed, those who favor Afrocentric schools and curriculum would argue that such schools enhance feelings of self worth and "the ability to function in society at large." Sonia R. Jarvis, Brown and the Afrocentric Curriculum, 101 Yale L. J., 1285, 1287 (1992), (hereinafter "Afrocentric Curriculum") (citing Molifi K. Asanti, The Afrocentric Idea in Education, 60 Journal of Negro Education 170-80 (1991); Tsehloane Keto, The Africa-Centered Perspective of History 25-28 (1989); William E. Nelson, Jr., School Desegregation and the Black Community, 17 Theory Into Practice 122, 125 (1978)). Some education commentators have even argued that ". . . .under some circumstances, separate schools may actually provide a better educational experience than many Black Colleges over the past ten years. Proponents also argue than an Afrocentric approach would strengthen community control over Black public schools—schools largely abandoned by the White community." Sonia Jarvis, Afrocentric Curriculum, supra at 1294 (citing Gil Kujovich, Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal, 72 Minn. L. Rev. 29, 38-39 (1987)); Black Colleges: Degrees in Poverty, Economist, v. 304, March 1, 1987 at 33-34.

Finally, several schools with high concentrations of students of color have had tremendous success in closing the so called "achievement gap". Throughout the United States, such public schools have tackled some of the toughest problems in urban education and been successful.[34] These exemplary schools are located in some of the poorest inner-city neighborhoods, serving student bodies that are largely poor and minority. These schools' success has shown that the achievement gap between students of color and white students, between poor and less-advantaged students, and between girls and boys, can be bridged.[35]

According to The Education Trust, a group dedicated to improving the academic achievement of all students, communities can take four steps to increase student achievement.[36] Education policy makers should ensure that the state and the schools:

1. set high standards;[37]

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[34] There are many examples of those schools, several of which have been profiled in recent media stories. See, e.g., Steve Wulf, How to Teach Our Children Well (It Can Be Done), Time, Oct. 27, 1997, at 68; Deborah Anderluh, Team Efforts Work Wonders in El Paso Curriculum Rebuilt to Boost Student Achievement, Sacremento Bee, Sept. 24, 1997, p.A8; Deborah Anderluh, Texas Reforms Are Turning High Poverty Schools Around, Sacramento Bee, Sept. 24, 1997, p. A1; Erik Larson, It's Not the Money, It's the Principal, Time, Oct. 27, 1997, p. 92.

[35] See Affidavit of Michelle Hanke Wolf, Ex. 28.

[36] See The Education Trust, Education Watch: State and National Data Book 15 (1996)

2. provide a challenging curriculum;[38]

3. produce expert teachers;[39]

4. keep an "education watch" by periodically reviewing data about the academic progress of the students.

The Education Trust has published data from all 50 states which supports their reliance on these four factors.[40] See also Robin D. Barnes, Black America and School Choice: Charting a New Course, 106 Yale L. J. 2375, 2397-2400 (1997) for a discussion of literature on creating successful schools.

Texas has implemented educational reforms consistent with those recommended above and has significantly increased student achievement as a result. Texas has "implemented all-encompassing, carefully aligned reforms that have resulted in schools tying curriculum to rigorous state exams, which in turn are aligned to detailed statewide standards. In addition to setting high standards and developing a challenging curriculum Texas holds its teachers and schools accountable for student achievement.[41] Texas' experience demonstrates that implementing the reforms such as those recommended by The Education Trust can improve the academic achievement of poor inner-city residents.

It is certainly not the intent of this rule to promote racial separatism; however, it is important to understand that a desegregation rule is not unreasonable, or ineffective, simply because some schools may remain racially identifiable. To improve achievement, the issue is not the racial composition of the school; instead, the important issues include access to standards, curriculum, and teachers that are of high quality. For integration, the important issues are

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[37] The value of setting high standards also is emphasized by Sandra Feldman, president of the American Federation of Teachers, who stated, "When you put rigorous standards in place, it helps parents, teachers and students to know what the expectations are, and it helps measure whether students are meeting those expectations. This is a method of knowing whether children are learning what they need to be learning at a certain age." James Collins, Standards: The States Go Their Own Ways, Time, Oct 27, 1997, p. 75.

[38] Central Park East Secondary School in New York City's East Harlem neighborhood is a testament to the power of a challenging curriculum to improve the academic achievement of poor inner city minority children. See Steve Wulf, How to Teach Our Children Well (It Can Be Done), Time, Oct. 27, 1997, at 68-69. That school has a very demanding curriculum which requires all students to demonstrate their mastery of fourteen subjects. See id. at 68-69.

[39] See Erik Larson, It's Not the Money, It's the Principal, Time, Oct. 27, 1997, at 92.

[40] See Education Watch, supra, note 36 (providing data for all 50 states, including demographics, investments, curriculum requirements, teacher training, test scores, and graduation rates).

[41] Deborah Anderluh, Team Efforts Work Wonders in El Paso Curriculum Rebuilt to Boost Student Achievement, Sacramento Bee, Sept. 24, 1997, at A8.

whether schools are intentionally segregated by race, whether children at racially identifiable schools have real options to attend integrated settings if they choose, and whether the overall desegregation plan is designed to provide maximum incentives for inter-racial contact. The proposed rules, in conjunction with other rules, provide for all of those important goals. Therefore, these proposed rules are needed and reasonable.

RULE: **3535.0160. (Continued)**

Subp. 1. Notice to district of plan including voluntary measures.

A. If a racially identifiable school reviewed under part 3535.0130 is not the result of segregation, the district shall be notified that it must develop and submit a plan to the commissioner for review that provides options to help integrate the racially identifiable school. The format of the plan shall be determined by the commissioner.

B. A racially identifiable school is not required to develop and submit a plan if the school is racially identifiable only as a result of:

(1) a concentration of enrolled American Indian students that exists as a result of attempting to meet the unique academic and culturally related educational needs of enrolled American Indian students through programs developed pursuant to the federal government's trust relationship with American Indian tribes or through an agreement with an American Indian tribal government; and

(2) the concentration exists as the result of voluntary choices made by American Indian parents, enrolled American Indian students, or both.

A racially identifiable school with a concentration of enrolled American Indian students is required to develop and submit a plan if the school is also racially identifiable as a result of the enrollment of other protected students excluding the enrollment of American Indian students.

This subpart is needed to begin to address a condition of racial imbalance at school sites within districts. It is reasonable, because in order to respond, districts must be notified which schools are implicated. This will enable them to begin the planning processes required under subpart 2 and 3.

The last portion of this subpart provides an exemption to schools with a concentration of American Indian students. The need for and reasonableness of treating those students differently, both here and throughout the rule, is examined below.

2. Introduction: need and reasonableness of provisions governing enrolled American Indian students.

The definition of need and reasonableness of provisions governing enrolled American Indian students and treatment of American Indians under the proposed desegregation rules has been discussed and revisited since at least the 1993 meetings of the Roundtable. It has been a long and sometimes intense discussion by all the parties involved. However, the Commissioner believes that the rule language now being proposed represents both a reasonable and necessary approach to this unique community of learners.

In order to fully understand the need for and reasonableness of the approach used in this rule with respect to American Indian students and their parents, a brief review of the philosophical concerns raised by stakeholders will be reviewed. This will be followed by a review of the procedural history of the language proposed in response to stakeholders' concerns. Finally, the need for and reasonableness of all of the rule language now being proposed will complete the discussion.

a. Stakeholder Concerns.[42]

1. **Recognition of sovereignty.** A common and frequent concern expressed by stakeholders was that American Indian students and their parents should be recognized as being members of sovereign nations. However the rule was to define "American Indian" students as a group, stakeholders made it clear that this sovereign aspect needed to be recognized and addressed.

2. **No mandatory busing of American Indian students.** A second concern was that the desegregation rule not require the disbursement of American Indian students through busing or other mandatory measures, particularly if students were attending a magnet or other school created to address their unique needs as American Indians. Many American Indian representatives expressed the view that American Indian students achieve greater academic and social benefits from being together in school that then do when they do not learn together in a group.

3. **Continuation of options because of unique status; linguistic and cultural needs.** Another common concern was that because of their unique political status American Indian students often receive education benefits and programs which are distinct from those provided to other students. There was concern that the desegregation rule not undermine these educational benefits.

4. **Voluntary integration concerns.** Some also expressed concern that American Indian students not be forced to participate even in voluntary integration planning

[42] The discussion that follows is an amalgamation of the concerns expressed by various educators, attorneys and representatives of several different American Indian tribes. While all the individuals and communities are not the same in terms of their political associations or views, for purposes of understanding the path that led to the current rule language all of the people who expressed views on this subject are referred to in one large group as "stakeholders".

and cooperative efforts; those individuals expressed the view that American Indian students have already been forced to integrate with non-Indian children, and that any benefit that would accrue from further integration would only be for the non-Indian students. When concerns of distance or resource expenditure are added to the equation, many expressed the belief that there was no benefit to voluntary desegregation efforts, but rather than it would constitute an unnecessary drain on a group of students and that are sometimes struggling to receive an adequate education within the provisions available to them at their home school. See Ex. 29.

5. **Complete exemption for all American Indian students, whether enrolled or directly affiliated with tribes.** A final view expressed by some was that all American Indian students should be totally exempt from the desegregation rule. While the other concerns have been addressed in the proposed rule, this is the one issue that was not fully incorporated. The legal reasons for continuing to include American Indian students under the purview of the rule will be discussed below.

b. Procedural history

As indicated above, these various stakeholder concerns have been discussed with many constituencies in several different settings over the past five years.

The first official response to these concerns was contained in the Roundtable rule draft relating to American Indian students. Some of the Roundtable language with respect to American Indian students was preserved. For example, the manner in which American Indian students were to be identified in the Roundtable draft was adopted in the State Board's draft and continues to the current draft.[43] Also, the State Board defined enrolled "American Indian" students both as members of a political group, to give recognition to sovereignty, as well as members of a racial group, to ensure that they are protected. See 3535.0110 subps. 2 and 4 (the need and reasonableness of these definitions is discussed further below). This policy was also contained in the Roundtable draft.

However, some provisions of the Roundtable draft were not adopted. Although well intentioned, some of the Roundtable language was very sweeping in its impact; it was also too vague. The problematic language provided as follows:

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[43] 3535.0120 subp. 3 states as follows:

In districts where the American Indian population is ten or more students, the parent education committee under Minnesota Statutes Section 126.51, subd. 1, in consultation with the American Indian parents the committee represents, may select as their identification procedure one of the following:

a. parent or guardian self-identification
b. the process for identification specified in United States Code, title 20, Section 7881 or;
c. the racial identification procedure used by the district for other students.

> If a school district chooses to establish a school which is designed primarily for attendance by American Indian learners which includes a culturally relevant curriculum, then that school is not a segregated school. Any learner in the district may choose to attend such a school. However, no learners may be required to attend such a school.
>
> In further recognition of the political status of American Indian tribes and learners, this rule does not apply to schools on/near reservation areas where the percentage of American Indian learners exceeds the percentages for learners of color established in B, C, and D of this subpart.

In 1995, when the State Board of Education began its efforts to draft a new desegregation rule in response to earlier legislative directives, this language was revisited. Several problems were identified.

First, many phrases were not defined, such as "on/near a reservation" and "culturally relevant curriculum". This would have made the rule very difficult to implement, and may not have satisfied rulemaking language requirements because of its vagueness. Moreover, the second part of the rule completely exempted all schools attended by American Indian students "on/near a reservation". This exemption would have occurred even if such a school were inferior and American Indian students were being required to attend. Those students would have no protection because of their status as American Indians. Certainly this is not reasonable in a rule that attempts to protect students from discrimination based on their race.

The breadth of this exemption became an even greater concern when the Board asked staff to calculate how many American Indian students live on or within 10 miles of a reservation (the 10 mile figure was an effort to begin to give some definition to the notion of being "near" a reservation.) The surprising answer was that 11,301 students or 72.1% of American Indian students lived on or within 10 miles of a reservation. See Ex. 30. Thus, this one exemption would have eliminated nearly three quarters of American Indian students from the protections afforded by the rule. As a result, in the fall of 1995 the Board determined not to include such language.

In February of 1996, slightly different language was proposed by one Board member. That language provided as follows:

> In further recognition of the political status of American Indian tribes and learners, this rule does not apply to schools on or near reservation areas where the percentage of American Indian learners causes a school to be determined a racially identifiable school or a district to be determined a racially isolated district.

One concern articulated in support of this proposed language was that districts might simply choose to close schools serving American Indian students rather than comply with the requirements of the desegregation rule being developed. Another concern was that culturally relevant schools might have to engage in voluntary desegregation efforts or else would be

dissolved completely. A third opinion expressed was that American Indian students should, because of sovereignty, be totally exempt from the rule. The Board voted to add the new language and consider the difficulties it raised at a subsequent meeting.

At its May 1996 meeting, the issues raised by the language were discussed in some detail. Staff proposed new language in an attempt to address some of the concerns. See Ex. 31. Shortly thereafter also in May 1996, legal counsel for the State Board, counsel for several different tribes and staff for DCFL met to discuss this new alternative. Over the course of the summer, counsel for SBE and counsel for at least one of the tribes exchanged correspondence in an effort to further refine the rule in a way that would meet both policy and legal concerns.

In early 1997, David Beaulieu, former Commissioner of the Department of Human Rights, was appointed Director of Indian Education for the DCFL. He began working with legal counsel for the State Board to more precisely address the stakeholder concerns articulated above, while preserving the protections afforded by the rule to American Indian children. These discussions and rule drafts were circulated widely by Mr. Beaulieu through the American Indian community, and were received quite well. These included elimination from the definition of "segregation" schools which are created to provide special programs for American Indian students, so long as students voluntarily attend those schools (3535.0110 subp. 9.B.); language that would require the participation of American Indian parents in voluntary integration planning (now proposed as 3535.0160 subp. 2 and 3535.0170 subp. 3); language that would encourage the creation of programs designed to serve the unique needs of American Indian students in voluntary integration plans (3535.0160 subp. 3.D.(6) and 3535.0170 subp. 5.D. (6)).

These changes addressed several concerns. They preserved the many special programs available to American Indian students, and encouraged their further development in voluntary desegregation planning. They more fully involved American Indian parents in curriculum planning, as anticipated by Minnesota's American Indian Education Act (Minn. Stat. §§126.45-55). They also excluded schools such as American Indian magnets from the definition of "intentional segregation", thereby eliminating the concern about mandatory busing simply in response to a concentration of American Indian students.[44]

These changes seemed to address most of the concerns previously raised. However, in the summer of 1997 a new concern began to be raised; this was that the belief that even voluntary integration efforts would prove onerous in rural Minnesota communities. In order to respond, in September 1997 several Board members from the State Board of Education, and legal counsel for the Board attended a meeting in Carlton, Minnesota. At that meeting various educators vehemently expressed the view that even voluntary efforts of desegregation planning were not of benefit to American Indian students, especially if there were geographic burdens involved. These concerns were communicated to the State Board, and further revisions based on geographic isolation were made in the rule.[45]

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[44] However, such schools will still be subject to review by the Commissioner, to ensure that they are receiving equitable resources and are not the result of intentional, discriminatory conduct. This was not the case in the Roundtable language, or the language proposed in February of 1996.

[45] These exemptions were modified by the Commissioner.

When the Commissioner of the Department of Children, Families & Learning began the task of completing the desegregation rule, he revisited all of these issues, and identified one more. He was concerned about the fact that many of the districts with concentrations of American Indian students were districts which, when required to participate with surrounding districts, would find the same mix of white and American Indian students in the districts with whom they would be cooperating. See Ex. 32. It did not seem reasonable to require a district comprised of American Indian students and white students to cooperate with another district with the same racial make-up. Therefore, mindful of all the issues previously articulated by stakeholders, the Commissioner added language that would exempt such districts and racially identifiable sites from integration planning. Such efforts will only be required if the protected student enrollment, excluding the American Indian student enrollment, would otherwise make a school site racially identifiable, or a school district racially isolated.

c. How stakeholder concerns have been addressed; why the changes in response are necessary and reasonable.

1. Recognition of sovereign status and racial component in definition of "American Indian" student.

One of the main concerns of the stakeholders was to ensure that the unique sovereign status of American Indian students be recognized. However, a policy concern of the State Board was that there be a racial definition as well, to ensure that American Indians receive the protection from discrimination afforded by the rule.

Both policies are addressed by defining American Indian students not only as members of a racial group entitled to protection under the rule, but also as members of a political group for those who have a tribal enrollment.

3535.0110 subp. 4 defines "protected students" as:

> students who self-identify or are identified in the general racial categories of Americans, Chicano/Latin Americans and American Indian/Alaskan Native.

3535.0010 subp. 2 also creates a category known as "Enrolled American Indian students". Those students are defined as follows:

> "Enrolled American Indian students" means those students who live on or off a reservation and are enrolled in a federally recognized tribe. Enrolled American Indian students have dual status as protected students under subpart 4 and members of sovereign nations.

The definition of American Indians as a racial group (the first definition above) is needed to ensure that such students receive the protection of the rule. It is reasonable because courts have acknowledged that there is a racial component to having American Indian heritage. See

Booker v. Special School Dist. No. 1, 451 F.Supp 659, 667 (D. Minn. 1978) aff'd, 585 F.2d 347 (8th Cir. 1978), cert. denied, 443 U.S. 915, 99 S.Ct. 3106 (1979).

These definitions are also both needed and reasonable because they are consistent with federal and state court decisions that recognize the dual status of American Indians enrolled in a federally recognized tribe as members of both racial and political groups. See Morton v. Mancari, 417 U.S. 535, 553 n. 24, 94 S.Ct. 2474, 2484 n, 24 (1974); Booker v. Special School District No. 1, 451 F.Supp. 659, 667-68 (D. Minn. 1978),aff'd 585 F.2d 347 (8th Cir. 1978), cert. denied, 443 U.S. 95 (1979); Jill Gavle v. Little Six Inc., 555 N.W. 2d 284 (Minn. 1996) (citing Getcher, et al., Cases and Materials on Federal Indian Law 8 (3d. ed. 1993).

2. Elimination of mandatory busing; enabling the continued existence of "culturally specific" schools.

Another concern expressed by stakeholders was that the new rule might result in busing and disbursement of American Indian students any time there is a concentration of those students at a particular site, such as at an American Indian magnet. However, this concern has been addressed in two ways.

First, mandatory busing would only be permissible as an option if a condition of intentional, discriminatory district action were found. For example, if a district created a school only for American Indian students, made American Indian students attend that school and provided it inequitable resources, then mandatory busing might be used as a cure for that situation.

However, just to ensure that schools such as American Indian magnets are not considered "segregated", additional language was included. 3535.0010 subp. 9.B. provides:

> In addition to the factors in item A (which provide a definition of intentional, discriminatory conduct), it is not segregation for concentrations of enrolled American Indian students to exist within schools or school districts:
>
> (1) if the concentration exists as a result of attempting to meet the unique academic and culturally related education needs of enrolled American Indian students through programs developed pursuant to the federal government trust relationship with American Indian tribes or through an agreement with an American Indian tribal government; and
>
> (2) the concentration exists as the result of voluntary choices made by American Indian parents, enrolled American Indian students, or both.

This language is necessary to ensure that programs which are made available specifically for the benefit of enrolled American Indian students will not be disbanded and labeled as acts of

"segregation". It is reasonable because it ties the programs to their legal justification (the federal trust doctrine) and ensures that even with such justification the programs are voluntarily chosen by the students they are intended to benefit.

3. Preservation of programs and benefits unequally available to American Indian students.

Another concern of stakeholders was that the programs and benefits available to American Indian students under state and federal law not be undermined by the rule. This concern has been addressed in several ways.

The American Indian Education Act of 1988 (Minn. Stat. §§126.45-55) provides certain benefits to American Indian students. Among these is the creation of an American Indian parent committee in districts with 10 percent or more American Indian students. The idea is to involve American Indian parents in the identification and development of the unique issues that affect their children in the educational context. See Minn. Stat. §126.51.

In the proposed rules, parts 3535.0160 subp. 2 and 3535.0170 subp. 3 incorporate these benefits by requiring the inclusion of representatives from the American Indian parent committee in both intra and inter-district desegregation planning. These provisions are necessary and reasonable because they preserve the opportunities afforded American Indian students under Minn. Stat. §126.51 subd. 1, a concern of the stakeholders.

The American Indian Education Act also promotes the creation of "programs specially designed to meet the(se) unique educational or culturally related academic needs (of American Indian students)." See Minn. Stat. §126.46. Parts 3535.0160 subp. 3.D.(6) and 3535.0170 subp.5.D.(6) incorporate these benefits by including such programs as examples of the types of options that might improve integration both within the district and across district lines. Again, these provisions are necessary and reasonable because they preserve and encourage opportunities specifically recognized and encouraged by the Minnesota legislature.

4. Eliminating the burdensome aspects of voluntary integration planning for schools and districts with enrolled American Indian students.

One of the concerns expressed at the 1997 meeting in Carlton, Minnesota was that there was no real benefit to cooperative integration efforts undertaken between predominantly "white" schools and schools with American Indian learners. It was argued that American Indian students have already experienced "integration" with white students and white culture; any further requirement that would result in further mixing with white students would not only be redundant, but also would pose a drain on communities already taxed in many ways. See Ex. 29.

When the Commissioner revisited this issue, he included a review of the particular school sites and districts that would be required to participate in voluntary integration planning. The surprising result was that in rural districts with a concentration of enrolled American Indian students, the surrounding districts had virtually all white students, or some smaller mix of white and American Indian students. See Ex. 32. For those with enrollments of majority American

Indian students, such as Pine Point, the distances to travel would have been quite extensive, and again they would be integrating with primarily white students or some combination of white and American Indian students. This also tended to be true of racially identifiable school sites.

It did not appear to be reasonable to make an "isolated" district with a population, for example, of 35% American Indian, and 62% white students and 3% other protected students undertake voluntary integration planning with a neighboring district that had a predominantly white population. Nothing would be gained by the American Indian group, because they would only be integrating with more white students---a condition they would already have experienced in their home district. In those cases where American Indian students were the majority of the district population, the distances they would have to travel to cooperate with another district---again comprised of predominantly white students---would have been quite high. Many districts with such concentrations of students wrote to indicate that cooperative planning under those circumstances would be burdensome. See Ex. 33. Thus, 3535.0170 subp. 1.B. exempts such districts from voluntary planning requirements. Similarly, 3535.0160 subp. 1.B. exempts such racially identifiable school sites.

5. American Indian students are not totally exempted from the rule, because such an exemption is not reasonable.

During the debate over this final issue, it was argued that there is a compelling state interest in favor of a total exemption of American Indian students from the rule; this was argued to be the recognition and support of tribes as sovereign nations. However, it is important to emphasize that the proposed rule is not a regulation of tribal-run schools on reservations; if that were the case, there would be a strong argument that the rule should not apply to such schools. The rule being proposed does not apply to tribal-run schools, or even to students directly, but rather to Minnesota public schools which are attended by American Indian students. Given this reality, it is difficult to articulate how tribal self-determination is advanced by the exemption of American Indian students from the protection of an anti-discrimination rule. Furthermore, if tribal self-determination is a compelling state interest which justifies exempting all American Indian students attending public schools from state regulation, then this rationale could be extended to exempt American Indian students from several other regulations when they are attending public schools, such as graduation standards, teacher licenses, special education services, or due process rights under the Pupil Fair Dismissal Act. This result is not needed or reasonable. Therefore, American Indian students are included in and protected by the proposed rule.

RULE: 3535.0160 (Continued)

Subp. 2. Community collaboration council. The district shall establish and use a community collaboration council to assist in developing the district's plan under this part. The council shall be reasonably representative of the diversity of the district. In communities with ten or more American Indian students, representation from the American Indian parent committee under Minnesota Statutes, section 126.51 is required on the community collaboration council. If a district has an existing committee whose

composition reasonably reflects the diversity of the district, for example, school site councils or district curriculum advisory councils, that committee may be used to provide the planning required by this part. The community collaboration council shall identify integration issues at each racially identifiable school and action goals designed to address those integration issues. After identifying the issues and goals for each school, the council shall develop a plan for integration at each school that may include, for example, options under subpart 3.

This provision is needed because if integration decisions are to be effective, they must be reflective of the needs and views of various constituencies making up the school community. Moreover, if the integration efforts are based on the voluntary efforts of students and parents, the process will be much more effective if the views and needs of those individuals are considered in the planning phase. In Strategies for Effective Integration[46] several sociologists studying ways to maximize integration efforts observed:

> Many school districts have formed broad-based citizens' committees to work with school district personnel in designing desegregation plans. These committees typically represent all major racial and ethnic groups as well as parents and education, business, and political leaders. . . . The major purpose of these committees is to maximize the acceptability of the plan to the community, given the constraints imposed by courts or other governmental agencies. . . .
>
> These committees should equally represent all elements of the community and all racial and ethnic groups even if that means representation on these committees is disproportionate to group representation in the community. Equal committee presentation provides equal opportunities for groups who are in the minority in the community to influence the work of those committees. . . .

Id. at 74-75.

The provision is needed because the community collaboration council is to provide the representation and opportunity for input identified above. The perspectives of different racial groups will be gathered, and there will be "grass roots" input on what works, rather than a dictation from the "top down". By requiring the district to convene a council of this sort, the district will be better informed about the views, needs and goals of its community members. Community representatives will bring a wider perspective to bear on what types of activities will benefit and be responsive to the local community as a whole. Requiring a community council is needed and reasonable.

The sentence that requires particular representation of American Indian parents on these committees is necessary and reasonable, because the requirement is consistent with the requirements for such parent education committees under Minn. Stat. §126.51. See also Section V.G.

[46] Willis D. Hawley, et al., Strategies for Effective Integration, 74-75 (1983).

Subp. 3. District plan.

A. After receiving the plan required under subpart 2 from its community collaboration council, the district shall provide a plan to the commissioner that describes the integration efforts the district plans to implement at each racially identifiable school. The plan shall be written and adopted by the end of the academic year in which the district received notice under subpart 1, or six months later, whichever is longer. The plan shall include:

(1) the extent of community outreach that preceded the plan;

(2) integration issues identified;

(3) action goals of the integration effort;

(4) how the action goals will be or are being accomplished.

B. All plans under this part must be educationally justifiable and contain options for intradistrict integration that may include, for example:

(1) duplicating programs that have demonstrated success in improving student learning at schools that are racially identifiable;

(2) providing incentives to help balance racially identifiable schools, for example, providing:

(a) incentives to low-income students to transfer to schools that are not racially identifiable;

(b) transportation; and

(c) interdistrict opportunities and collaborative efforts with other districts;

(3) providing incentives to teachers to improve the distribution of teachers of all races at schools across the district, including:

(a) staff development opportunities;

(b) strategies for attracting and retaining staff who serve as role models; and

(c) strategies for attracting and retaining staff who have a record of success in teaching protected students, low-income students, or both;

(4) **greater promotion of programs provided at racially identifiable schools designed to attract a wide range of students;**

(5) **providing smaller class sizes, greater counseling and support services, and more extracurricular opportunities and other resources at racially identifiable schools as compared to schools that are not racially identifiable or at schools with a higher concentration of low-income students; and**

(6) **providing programs promoting instruction about different cultures, including options uniquely relevant to American Indian students, including, for example, American Indian language and culture programs under Minnesota Statutes, section 126.48.**

The format of the integration plan shall be consistent with, and if possible included into a district's comprehensive plan.

The provision above requires districts to develop a plan to address racially identifiable schools once their community collaboration councils have had the opportunity to provide input on the type of plan to be used. The integration plan itself is based on options which are aimed at encouraging parents and students to make choices leading to greater integration. Requiring a plan is needed because this will cause districts to systematically address what the integration needs are at all racially identifiable sites. It will also assure that districts develop integrated options for students at those sites.

The options outlined above are reasonable, because they are based on efforts which maximize choice while encouraging integration – two important goals of this rule. Sociologist James Coleman described the importance of choice to successful integration in this way:

> It was once assumed that policies of radical school desegregation could be instituted, such as a busing order to create instant racial balance, and the resulting populations would correspond to the assignment of children to the schools-no matter how much busing, no matter how many objections by parents to the school assignments.
>
> It is now evident, despite the unwillingness of some to accept the fact, that there are extensive losses of white students from large central cities when desegregation occurs. . . . An implication that should have been seen all along but can no longer be ignored is that a child's enrollment in a given public school is not determined by a governmental decision alone. It is a result of a governmental decision (the making of school assignments) and parental decision, whether to remain in the same residential location, whether to send their child to a private school, or which school district to move into when moving out of a metropolitan area. The fact that the child's enrollment is a result of two decisions operating jointly means that

government policies must, to be effective, anticipate parental decisions and obtain the parents' active cooperation in implementing school policies.

James S. Coleman, New Incentives for Desegregation, supra, at 13. Rather than mandating integration, Mr. Coleman came to advocate for "a system of incentives combined with choice." Id. at 49. See also Christine H. Rossell, The Carrot or the Stick for School Desegregation Policy: Magnet Schools or Forced Busing (1990); Section V.G.1, rationale for treatment of the concept of "racial balance". See also, Christine H. Rossell, Controlled-Choice Desegregation Plans, supra.

Finally, it is necessary and reasonable to require that the Commissioner be advised as to the extent of community engagement, issues identified, action goals agreed upon, and how achievement of those goals will be, or is being accomplished. All of this information is critical in enabling the Commissioner to evaluate whether the plans which are proposed and then implemented by districts are representative of the views of the community. It is also necessary to enable the Commissioner to evaluate the plans, as required by the next subpart.

RULE: 3535.0160 (Continued)

Subp. 4. Commissioner's duties.

A. The commissioner shall:

(1) evaluate any plans developed under this part at the end of each academic year after which a plan is implemented;

(2) each academic year after a plan is implemented, report to the house and senate education committees any reduction in the percentage of protected students at racially identifiable schools; and

(3) each academic year after a plan is implemented, report to the house and senate education committees if the enrollment of protected students remains constant or increases at racially identifiable schools.

B. The commissioner may recommend financial incentives that are aimed at compensating or rewarding districts for programs or activities that have been successful.

C. The commissioner may recommend legislative action to address the condition of racially identifiable schools within the district.

This section is necessary to ensure accountability in the districts' efforts to implement integration plans using options. In order to ensure accountability, the Commissioner must evaluate a plan after it has been implemented.

This subpart does not provide precise measurements, such as racial quotas, for evaluating a plan. This is reasonable because there is no constitutional right to a particular racial balance in schools, (see Section V.G.1). It is also reasonable because the Fourteenth Amendment as recently interpreted by the Supreme Court and other courts severely limits the use of racial quotas and other race-based remedies. See Section III.C. generally.

Moreover, the fact that a plan is implemented does not necessarily mean that it will immediately result in a more racially balanced school. This can only be determined after a period of time. The real point of this subpart is to evaluate whether a district has made a good faith effort to implement a plan which addresses the existence of racially identifiable schools. This can be done in a variety of ways, such as looking at whether the plan developed by the district was actually implemented, or whether there are simply plans to implement. The Commissioner might also talk to the community collaboration council to get its views concerning whether the district followed through on ideas for better integration; another option would be to see whether the district met the action goals agreed on in its plan.

Finally, since the rule does not result in automatic sanctions for violation, but rather in a report to the legislature, it is more reasonable to provide flexibility to the Commissioner as he or she evaluates a plan. In other words, since the rule does not result in direct sanctions for non-compliance, it is reasonable that the standards by which such non-compliance must be judged are more flexible.

This section of the rule also provides for reports to the appropriate legislative committees with recommendations for rewards, in the event of successful compliance, or for corrective action, if such action is needed. This too is reasonable given the limited authority of the Commissioner. The Commissioner does not have the "power of the purse." Only the legislature can provide financial incentives for districts doing a good job addressing racial imbalance within their boundaries. Further, if a district is doing a poor job at integrating its schools, there may be a variety of reasons, including lack of money. Only the legislature can correct this situation.

Finally, if a district simply refuses to act to implement a voluntary program, the authority of the Commissioner is limited. Only the legislature can take action to "reconstitute" a school or district; similarly, only the legislature can determine to re-distribute education funding to reward or sanction a district. Thus, it is reasonable to keep the legislature informed about what is happening, both positively and negatively, as the ultimate means of enforcing voluntary integration efforts. This rule provides an informed and timely way of accomplishing that goal.

RULE: 3535.0160 (Continued)

Subp. 5. Timeline. Each integration plan shall remain in place for three years from the date of review by the commissioner, unless earlier modified by the district and reviewed by the commissioner. Schools that are newly identified as racially identifiable or that were included in a plan under this part but remain racially identifiable after three years from the date of the review by the commissioner shall be subject to the procedures outlined in parts 3535.0130 to 3535.0160.

It is necessary to provide some period of time during which an integration plan is implemented and during which the district does not have to continually report on and address the integration efforts at each racially identifiable school. Base on past experience, district administrators indicated that three years was a reasonable period of time to implement a voluntary plan and to see whether the plan was working. Thus, this is the time frame proposed by the Commissioner.

H. RULE: 3535.0170 INTEGRATION OF RACIALLY ISOLATED SCHOOL DISTRICTS.

Introduction.

As discussed previously, there is a growing concern over the gap between the numbers of protected students attending urban schools versus those in suburban districts. This is also increasingly a concern in non-urban districts. In order to be able to monitor this condition, it is both necessary and reasonable for the Commissioner to annually review districts' student enrollment data. If it is determined that a district is "racially-isolated" as that is defined in part 3535.0110, subp. 7 or that a district adjoins a racially isolated district, the notification process required by subpart 1 of the rule will both advise the districts of the condition and begin the process for addressing this situation.

Some will argue that the rule should include mandatory provisions for interdistrict integration. However, a major difficulty in addressing this issue at an administrative level is that there is no statutory authority for the Commissioner to order mandatory transfers of students across district lines. A basic rule of administrative law is that administrative agencies, such as the Department of Children, Families & Learning, have only such authority as is granted to them by statute, or is necessarily implied from the express grant of authority. See In re De Laria Transportation, Inc., 427 N.W. 2d 745 (Minn. Ct. App. 1988). Establishing district lines is an exercise of legislative authority. Chapter 122 governs the implementation of this authority. Thus, the Commissioner and his predecessor in rulemaking, the State Board of Education lack the authority to change those boundaries to facilitate cross-district integration, absent legislative authorization.

Without this authority, the Commissioner is limited to addressing cross-district integration using student transfers into and out of districts. However, this power has been reserved by the legislature as well, and has not been delegated to the Commissioner. As a starting point, the legislature has established that students can attend, free of charge, the district of their residence. See Minn. §120.06 (1996), as amended by 1998 Minn. Laws ch. 397, art. 1, §§7-8. The legislature has provided for certain exceptions to this rule. For example, Minn. Stat. § 120.062 (1996 and Supp. 1997), as amended by 1998 Minn. Laws ch. 397, art. 1, §§3, 9-14, provides an "enrollment options program . . . to enable any pupil to attend a school or programs in a district in which the pupil does not reside, subject to the limitation in this section." Similarly, Minn. Stat. §120.075-.0752 (1996 and Supp. 1997), as amended by 1998 Minn. Laws ch. 39, art. 1 §§16-27, establish additional circumstances under which students can transfer into and out of districts. Students can also transfer to a non-resident district if they pay tuition to the

receiving district, upon receiving approval from that district. See Minn. Stat. §123.39., subd 5 (1996). However, absent a statutory exception such as those outlined above, a student must attend the district of residence. There is nothing in these statutes which gives the Commissioner explicit or implicit authority to change these laws; similarly, there is nothing in the enabling legislation for this rule from which one could imply such authority.

The legislature has also established fairly circumscribed conditions for transportation of students across district lines; however, even when some discretion is provided, the discretion rests entirely with local districts, not with the Commissioner. See generally Minn. Stat.§123.39, subd. 1 (1996) as amended by 1998 Minn. Laws, ch. 397, art. 6 §83 ("[t]he board may also provide for the transportation of pupils to schools in other districts for grades or departments not maintained in the district, including high school, at the expense of the district, when funds are available therefore and if agreeable to the district to which it is proposed to transport the pupils,. . . subject to its rule."); Minn. Stat. §123.39, subd. 4 (1996) ("[t]he board may provide for the instruction of any resident pupil in another district when inadequate room, distance to school, unfavorable road conditions, or other facts or conditions make attendance in the pupil's own district unreasonably difficult or impractical. . . ."); Minn. Stat. §123.39, subd. 6 (Supp. 1997) (" if requested, a non-resident district shall transport a non-resident pupil within its borders and may transport a non-resident pupil within the pupil's resident district. . . . [but must] notify the pupil's resident district of it's decision. . .); §123.39, subd. 1, supra ([w]hen transportation is provided, scheduling of routes, establishment of the location of bus stops, manner and method of transportation, control and discipline of school children and any other matter relating thereto shall be within the sole discretion, control, and management of the school board").

In none of these statutes does the legislature explicitly or implicitly give the Commissioner the authority to order districts to educate non-resident students; nor do they provide authority for the Commissioner to order districts to provide transportation across district lines. Finally, the enabling legislation for these rules cannot be read to explicitly or implicitly grant such authority. Thus, if the Commissioner attempted to promulgate a rule which ordered districts to open their doors to non-resident children, or which ordered the transportation of those children under certain circumstances, such a rule would likely be beyond the Commissioner's authority to promulgate. Besides the lack of statutory authority to order inter-district busing, there may also be constitutional difficulties with such a provision. As long ago as 1974, the U.S. Supreme Court in Milliken v. Bradley, 418 U.S. 717, 94 S. Ct. 3112 (1974), held that courts are without the authority to order race-based cross-district remedies absent a finding that discriminatory practices cutting across district lines were responsible for the segregation between districts. For the reasons discussed in Section III.C. above, the same rationale would likely apply to attempts by the Commissioner to order race-based transfers, absent a finding that the districts in question had engaged in intentional discrimination.

Without statutory authority to order such transfers, and given the doubtful constitutional question, the most reasonable, effective way to address racial imbalance between districts is to encourage voluntary efforts and to monitor, evaluate and report on those efforts to the entity (the legislature) that does have the authority to make structural and financial changes in the way districts operate.

Thus, part 3535.0170 requires racially isolated districts and their adjoining districts to undertake collaborative planning aimed at better integration of their student populations.[47] The districts, after consultation with the multi-district collaboration councils[48] must propose a plan which will provide meaningful incentives for students to travel beyond their own district lines which will promote better inter-district integration. The list contained in section 3535.0170, subpart 5 is intended to provide a non-exhaustive description of the type of incentives which can result in effective inter-district desegregation. It is a reasonable series of efforts, which are within the authority of the districts, and which, if implemented, should achieve the goal of providing the opportunity for greater inter-racial contacts between districts.

RULE: 3535.0170 (Continued)

Subpart 1. Evaluation.

A. The commissioner shall annually evaluate the enrollment of protected students in each district to determine whether the district as a whole is racially isolated. If the commissioner determines that a district is racially isolated, as defined in part 3535.0110, subpart 8, the commissioner shall immediately notify the district and its adjoining districts. The commissioner may also send notice to other districts that are not adjoining if the commissioner determines that it would be geographically feasible for such districts to participate in cross-district planning. Districts that are not adjoining may choose whether to participate in the cross-district planning.

B. A racially isolated district shall not be required to follow subparts 2 to 8 if the district is isolated only as a result of the enrollment of American Indian students whose unique academic and culturally related educational needs are being addressed by district programs and the district has established a parent committee under Minnesota Statutes, section 124D.78. A district racially isolated as a result of the enrollment of American Indian students shall be required to follow subparts 2 to 8, if the district is also racially isolated as a result of the enrollment of other protected students excluding the enrollment of American Indian students.

This subpart is needed to begin to address the existence of racially isolated districts. The existence of such districts, as defined by the rule, will cause the Commissioner to send notice of the requirement of cooperation to the racially isolated districts and adjoining districts. It is also reasonable to notify non-adjoining districts, because many have expressed a desire to participate

[47] Given the logistics involved in traveling from one side of a district, across another and into a third, it is not reasonable to require collaboration unless the districts involved are physically proximate; thus, the requirement involves only adjoining districts. However, non-adjoining districts are not precluded from participating, as the rule language indicates.

[48] The rationale for these multi-district councils is the same as the rationale for intra-district community collaboration councils.

in the planning efforts if they are aware of them. However, for the logistical reasons discussed below, it is not reasonable to require the participation of non-adjoining districts. (For the rationale of exempting certain racially isolated American Indian school sites, see Section V.G.2.)

a. Requiring only isolated and adjoining districts to participate is reasonable, because it requires physically proximate districts to work together.

In order for a voluntary plan to work particularly with children who are young, cross-district options must not be burdensome, but rather, convenient; otherwise, any incentive to travel to a different district is overcome by the burdensomeness of getting there. James Coleman described the importance of convenience several years ago:

> No school desegregation can be carried out, whether it includes the suburbs or not, that imposes an extreme burden upon parents or children. Resourceful parents will find a way of improving their situation. They may choose to send their children to private schools, as many have done. They choose to move beyond the reach of the policy. For example, county-wide desegregation in Louisville, Kentucky has led surrounding counties to become among the fastest-growing in the nation.
>
> Any desegregation that is to remain stable must involve the metropolitan area as a whole, and it must be a plan in which the coercive qualities are outweighed by the attractive ones.

James S. Coleman, New Incentives for Desegregation, v. 7, no. 3 Human Rights, 10 (Fall 1978).

Moreover, the further students have to be transported, the more it costs. For example, this past year the Tri-District Magnet school has transported students from its three participating districts, all of which are adjoining. The additional cost of transporting these students varies from $916 per student in suburban North St. Paul to $387 per student in St. Paul. See Appendix A. Thus, the closer the participating districts, the lower the transportation cost.

For these reasons, the rule as proposed only requires adjoining districts to work together to provide cross-district integration. In most cases, the distances are not overly burdensome. Where distances are greater, districts are given the flexibility to use alternatives such as after-school programs and summer exchanges to provide integrated opportunities. This will greatly increase the likelihood that parents and students will choose to participate.

b. The collaboration requirement is reasonable because it includes out-state districts as well as metro districts.

As indicated previously, the problem of racial isolation is not just occurring in metropolitan districts; it is also increasingly occurring in districts around the state. The current rule does not even consider cross-district racial isolation; the Roundtable rule draft (discussed

further in Appendix B) was limited almost exclusively to the seven county metropolitan area.[49] Under current demographics, the Roundtable draft would have applied to only four districts outside of the metropolitan area, all of which are on or near reservations: Mahnomen, Red Lake, Nett Lake and Cass Lake. However, several out-state districts have concentrations of protected class students which are very disproportionate to their neighbors; these include, for example, Worthington, with 25.88% non-white enrollment, adjoining to Ellsworth with 0%, Adrian with 2.34%, Fulda, with 7.14%, Brewster, with 4.17%, and Round Lake, with 1.36% protected enrollment. (See Ex. 12 Department of Children, Families and Learning, Kdgn-12 Student Ethnic Enrollment, Fall 1997 for further examples; altogether there are 4 districts outside of the metro area, covered by the rule with enrollments that exceed those of adjoining districts by more than 20%. Others are growing and may soon come within the purview of the rule. Id.). Many of these districts have limited ability to integrate within their own borders, because of small enrollments and few schools. For example, Mountain Lake has one K-6 and one 7-12 school.[50] Thus, it is both necessary and reasonable to include surrounding districts in the effort to provide more meaningful integration.

Finally, as demographics continue to change in out-state districts, even as they have already changed in the metropolitan area, it is reasonable to begin to monitor these changes and to require that districts collaboratively address racial isolation; otherwise, districts with growing protected student populations may begin to face some of the same difficulties that their urban counterparts are now facing. The requirement that a "racially isolated school district" work with adjoining districts will facilitate that monitoring and collaboration.

RULE: 3535.0170 (Continued)

Subp. 2. Establishment of multi-district collaboration council. Upon receiving notice under subpart 1, the isolated and adjoining districts shall establish a multidistrict collaboration council, as provided in subpart 3, to develop a plan under this part. The council shall work as provided under subpart 5 to identify ways to offer cross-district opportunities to improve integration.

The need and reasonableness for the establishment of multi-district councils is similar to the rationale for creating community collaboration councils. (See Section V.G. discussion under subp. 2 above.)

Moreover, multi-district councils such as WMEP have demonstrated that they can be very effective instruments of integration. The Downtown Magnet School is the result of collaboration of 9 different districts planning to provide greater integration options. Thus, it is reasonable to build on a model that has already demonstrated its success.

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[49] The definition of racially isolated district in the Roundtable draft is any district which has a student of color enrollment of more than 50%.

[50] Source: Minnesota Education Directory, 1996-97, Ex. 15.

RULE: 3535.0170 (Continued)

Subp. 3. Membership of multi-district collaboration council. Each isolated district and each of its adjoining districts shall appoint individuals to participate in the multi-district collaboration council. The council shall be reasonably representative of the diversity of the participating districts. If any of the participating districts have an American Indian parent committee formed under Minnesota Statutes, section 124D.78, a representative of those committees shall also be appointed.

The need and reasonableness of the composition of the council is the same as the rationale for community collaboration councils above.

RULE: 3535.0170 (Continued)

Subp. 4. Alternatives to a multidistrict collaboration council.

A. Participating districts that are members of joint powers boards that have advisory councils meeting the requirements of subpart 3 may use those joint powers boards and advisory councils in lieu of creating a new council under subpart 2.

B. Participating districts that have an existing committee whose composition reflects the membership requirements of subpart 3, may use this committee in lieu of creating a new council under subpart 2.

It is neither reasonable or necessary to require duplication of committees, such as WMEP, that are already successfully collaborating. These subparts therefore encourage the use of existing committees that meet the rule requirements of a representative body.

RULE: 3535.0170 (Continued)

Subp. 5. Council cooperation and plan. The multidistrict collaboration council shall identify interdistrict integration issues resulting from the condition of racial isolation and action goals designed to address those integration issues. After identifying the issues and goals of cross-district integration, the council shall develop a joint collaboration plan for cross-district integration that may include the incentives contained in subpart 6, item D.

Subp. 6. District plan.

A. After receiving the plan required in subpart 5 from its council, each district shall review, modify if necessary, and ratify the integration plan. Each district shall provide a plan to the commissioner that describes the interdistrict integration efforts the district plans to implement. The plan shall be completed and ratified no longer than

12 months after the district receives notice under part 3535.0180, subpart 1. The plan shall include:

(1) the extent of community outreach that preceded the interdistrict plan;

(2) cross-district integration issues identified;

(3) goals of the integration effort; and

(4) how the goals will be or are being accomplished.

B. All collaboration plans under this part must be educationally justifiable and contain options for interdistrict integration that may include, for example:

(1) providing cooperative transportation that helps balance racially isolated districts;

(2) providing incentives for low-income students to transfer to districts that are not racially isolated;

(3) developing cooperative magnet programs or schools designed to increase racial balance in the affected districts;

(4) designing cooperative programs to enhance the experience of students of all races and from all backgrounds and origins;

(5) providing cooperative efforts to recruit teachers of color, and encouraging teacher exchanges, parent exchanges, and cooperative staff development programs;

(6) encouraging shared extracurricular opportunities, including, for example, community education programs that promote understanding, respect, and interaction among diverse community populations; and

(7) documenting, in districts with ten or more American Indian students, how American Indian students are able to participate in program options uniquely relevant to American Indian students, including, for example, language and culture programs under Minnesota Statutes, section 126.48, and how the students may participate in the district's voluntary integration efforts.

As discussed above, it is both necessary and reasonable to use voluntary integration efforts to address this issue on an inter-district basis. The examples listed above are reasonable because they are examples of options based integration measures that encourage integration

leaving districts free to chose alternatives that will meet community needs. See Christine H. Rossell, Controlled-Choice Desegregation Plans, supra.

RULE: 3535.0170 (Continued)

Subp. 7. Limits on participation in multidistrict collaboration councils. Notwithstanding subpart 2:

A. an isolated school district shall not be required to be part of two or more collaboration councils;

B. adjoining districts shall not be required to be part of two or more collaboration councils;

C. two adjoining racially isolated school districts shall not be required to participate together on the same collaboration council;

D. if a racially isolated district is a member of a joint powers board under subpart 4, its adjoining districts shall not be required to participate on the joint powers board; and

E. if an adjoining district is a racially isolated district exempted from subparts 2 to 8 under subpart 1, item B, the district shall not be required to be part of an interdistrict collaboration council and shall not be required to provide a plan of interdistrict integration efforts to the commissioner.

The needed and reasonableness of the exceptions above are based on avoiding duplicated efforts. For example, clauses A through C address situations in which a district might find itself part of two different multi-district councils-a situation that is not necessary. Clause D gives adjoining districts the right to "opt out" of joining a joint powers board if that is not the district's desire. It did not seem reasonable to force a district into a formal, organizational structure such as a joint powers board. For the need and reasonableness of exempting districts with American Indian students (Clause E), see Section V.G.2.

RULE: 3535.0170 (Continued)

Subp. 8. Timeline for reports. Once a mulitdistrict collaboration plan has been filed with the commissioner, it does not need to be renewed for a period of four years from the date of filing.

Districts that have been involved in inter-district planning for the past several years have indicated that it may take up to five years for an inter-district cooperative plan to begin to show

results. Thus, the Commissioner determined that it would be most reasonable to give plans under this rule four years before requiring districts to review and revise them.

I. RULE: 3535.0180 EVALUATION OF COLLABORATIVE EFFORTS.

The commissioner shall biennially evaluate the results of collaborative efforts under part 3535.0170 to determine whether the collaboration plan was implemented and whether the action goals have been substantially met. After reviewing the results, the commissioner shall report to the house and senate education committees whether a district implemented its collaboration plan and substantially met its action goals. The commissioner may also make recommendations for appropriate legislative action.

The rationale for evaluation, monitoring and reporting of inter-district desegregation efforts are the same as for voluntary efforts within a school district. (See Rationale for part 3535.0160 above.) The evaluation of inter-district efforts will take place every four years, since inter-district planning and implementation is logistically more difficult and time consuming.

APPLICATION TO A DISTRICT WITH AN EXISTING PLAN.

A school district with an approved desegregation plan in place on the effective date of parts 3535.0100 to 3535.0180 must prepare a voluntary plan under parts 3535.0100 to 3535.0180 for all sites previously covered by a desegregation plan.

This was necessary and reasonable to ensure that districts presently mandated to do integration planning will continue to do so.

VI. ANALYSIS OF RULE PROVISIONS BEING REPEALED: SECTIONS 3535.0200-3535.2800 EQUALITY OF EDUCATIONAL OPPORTUNITY, SCHOOL DESEGREGATION

REPEALER. Minnesota Rules, parts 3535.0200; 3535.0300; 3535.0400; 3535.0500; 3535.0600; 3535.0700; 3535.0900; 3535.1100; 3535.1200; 3535.1300; 3535.1500; 3535.1700; and 3535.2000, are repealed.

A. RULE 3535.0200: DEFINITIONS.

Subpart 1. Scope. For the purposes of parts 3535.0200 to 3535.2200, the following words and phrases shall have the meaning ascribed to them.

RATIONALE FOR REPEAL (Hereinafter "RATIONALE"): This Section is no longer needed because the numerical sections will have changed.

Subpart 2. Equal educational opportunity. "Equal educational opportunity" is defined as the provision of educational processes where each child of school age residing within a school district has equal access to the educational programs of the district essential to the child's needs and abilities regardless of racial or socioeconomic background.

This definition raises several implementation problems. First, it is inherently contradictory. If one child has greater educational needs than another, it is not possible to provide equal access to programs. For example, children with special education needs will require greater program resources than children without those needs. Thus, given that there will be disparities in needs, the definition is functionally impossible to implement.

Second, the definition provides no guidance regarding how to measure what is "essential" to a child's needs and abilities. This could be interpreted in a variety of ways, including providing the best teacher for a child given the child's particular abilities; for a child with attention deficit disorder, it might require placing the child in a classroom only with children who do not have the attentional isser. Arthur Wise, citing another scholar in the field, describes the limitations on providing the essential needs and abilities of each student:

> for any group of children in an area who are of approximately equal age and ability, there is presumably one teacher who is best qualified to instruct them but not all of the children can receive instruction from him on account of the limitations of size of school classes. Similarly, for any child, there is presumably one best group of children he might have for his classmates (children, of course, learn from each other as well as from the teacher), but it would be a matter of purest chance if it could be arranged that he attend school with just that group of classmates.

Arthur Wise, Rich Schools, Poor Schools: The Problem of Equal Educational Opportunity at 144 (1967) (citing Benson, The Cheerful Prospect, supra, at 66-67).

Finally, even if all of the other obstacles of the definition could be overcome, there remains the financial obstacle. The definitional section which requires "access to educational programs essential to the child's abilities" could be reasonably interpreted so as to require educational services which would maximize the potential of all students. While this is surely a worthwhile goal, this definition arguably converts that goal into a duty. The difficulty in meeting this duty has been aptly described by James Guthrie, an expert in education finance and policy.[51] The questions posed to Dr. Guthrie about this definition of equal educational opportunity, and his response, are very instructive:

> Q: Under [the full opportunity definition of "equal educational opportunity"]. . . equality if achieved by allocating educational resources to each student until he reaches the limits imposed by his own capabilities. Are you familiar with that definition?

[51] Dr. Guthrie testified as an expert in the Skeen v. State matter. His credentials, and excerpts from this testimony, are contained in Ex. 27.

Answer (by Dr. Guthrie): Yes, I am.

Q: Now is that definition consistent with notions of efficiency in you view?

A: I don't know if it's consistent with efficiency. It's not very consistent with any kind of reality I know. The, it's precisely that definition which was troublesome in the early equal protection suits in Illinois where the judge, in my judgment correctly, said it was not a judicially manageable standard because how do you ever determine if a child has received the resources sufficient to enable him or her to maximize their potential. That would seemingly almost take the lid off the public treasure. There is hardly a human who has maximized his or her potential, I suppose, and the resources necessary to do that would appear awesome. So . . . it would leave nothing else, no fewer—it would leave no other resources to do anything else in society.

Thus, the old definition is not reasonable, given at least three important measures. Therefore, it was not retained in the rule as proposed. Instead, the proposed rule takes a more measurable approach to equal educational opportunities. See Section V.D.

Subpart 3. Minority group students. The term "minority group students" is defined as students who are Black-American, American Indian, Spanish surnamed American, or Oriental Americans. The term "Spanish surnamed American" includes persons of Mexican, Puerto Rican, or Spanish origin or ancestry.

"Minority" is no longer used to refer to students of color. First, it is simply not accurate to describe students of color as the "minority" population in many urban settings. Second, the term is felt to be pejorative by many persons of color. Therefore, the term is being omitted in the new rule draft. The other categories of racial classification have remained basically the same, except that "oriental Americans" are now referred to as "Asian", and the term "Hispanic" has been used to represent the entire group of persons included in the "Spanish surnamed American" group.

Subpart 4. Segregation. Segregation occurs in a public school district when the minority composition of the pupils in any school building exceeds the minority racial composition of the student population of the entire district, for the grade level served by that school building, by more than 15 percent.

The rationale for changing the manner in which "segregation" is defined has been discussed at length in previous sections in this document. See particularly Sections II, III., and V.B.9.

B. RULE 3535.0300 POLICY

The State Board of Education recognizes many causes for inequality in educational opportunity, among which is racial segregation. The State Board of Education agrees with the United States Senate Report of the Select Committee on Equal Educational Opportunities that, "the evidence, taken as a whole, strongly supports the value of integrated education, sensitively conducted, in improving academic achievement of disadvantaged children and in increasing mutual understanding among students from all backgrounds."

The State Board of Education recognizes its duty to aid in the elimination of racial segregation in Minnesota public schools and therefore adopts these rules, the purpose of which is to direct and assist each school district in the identification of and the elimination of racial segregation which may exist in the public schools within the district. The rules which follow are designed to implement the policy of the State Board of Education as set forth in "Educational Leadership Role for Department of Education and Board of Education in Providing Equal Educational Opportunity," November 9, 1970.

Both the State Board and the Commissioner recognize that there are many causes for inequality in educational opportunity, including intentional racial segregation. For this reason, the new rule explicitly examines the factors traditionally relied on by courts to determine whether inequality exists as a direct result of intentional segregation. See Section V.D. However, the first paragraph of the old policy statement has been re-written in the proposed policy language to stress the societal benefits of integration. This is reasonable because it is more consistent with current sociological data. See Section V.B.5., definition of racial balance, and Section V.G. (Introduction).

The second paragraph is being replaced, primarily because it does not address the important legal distinction between intentional segregation and racial imbalance. The new policy reaffirms a commitment to desegregation, but recognizes a distinction in the duty and authority to rectify intentional forms of segregation as opposed to the duty and authority where racial isolation is not the result of government action. See Sections III.and V.B.9.

C. RULE 3535.0400 DUTIES OF LOCAL BOARDS, PENALTY FOR FAILURE TO COMPLY

Each local board shall, in accordance with parts 3535.0200 to 3535.2200, submit data to the Commissioner on the racial composition of each of the schools within its jurisdiction.

Each local board shall, if segregation is found to exist in any of its schools, submit to the Commissioner a comprehensive plan for the elimination of such segregation that will meet the requirements of parts 3535.0200 to 3535.2200; submit information to the Commissioner on the progress of implementation of any comprehensive plan which has

been approved; and implement in accordance with its schedule a comprehensive plan which has been approved. The penalty for noncompliance with parts 3535.0200 to 3535.2200 shall be the reduction of state aids pursuant to Minnesota Statutes 1971, Section 124.15.

The first paragraph of this section is virtually identical to the information required in proposed parts 3535.0120, subp. 1. Thus, this section is not being repealed, but is integrated in different sections of the proposed rule.

The second paragraph is comparable to the language in sections 3535.0130 and .0160. The only difference between the rule being proposed and the two sections being repealed is that a comprehensive plan to eliminate segregation under the proposed rule will only be required to address acts of intentional segregation. The reasons for making this distinction are discussed in Sections III. and V.B.9.

D. RULE 3535.0500 SUBMISSION OF DATA.

Subpart 1. Compliance. Each local board shall submit to the Commissioner by November 15 of each year such data as are required by subpart 2 of this part. If a local board fails to submit such data by November 15 annually, the Commissioner shall notify the board of non-compliance. A reasonable time of 15 days shall be allowed for compliance.

The first sentence of this section is comparable to the data collection requirements of proposed section 3535.0120, subp. 1, except that the submission dates are now tied to the MARSS reporting deadlines, which is consistent with actual practices over the past several years.

3535.0500 (Continued)

Subpart 2.

Each local board shall submit a report showing the number of students enrolled which belong to each race for each of the schools under its jurisdiction. The information required to be submitted may be based upon sight count or any other method determined by the local board to be accurate. The clerk of the local board of education shall certify the accuracy of the report.

The first sentence of this section is virtually the same as that in proposed part 3535.0120 subp. 1. However, the data collection method described in the second sentence (i.e. sight count, or as otherwise determined by the district) has been changed. As indicated in the rationale for proposed part 3535.0120 subp. 2, the experience of those who took part in the Roundtable discussions was that district sight counts were not a reliable means of identifying students. Moreover, certification by a local school board clerk does nothing to ensure the accuracy of the

sight counts. Therefore, those processes are given last priority behind student or parental identification methods.

E. RULE 3535.0600 SUBMISSION OF PLAN.

The Commissioner shall examine the data which are submitted pursuant to part 3535.0500. On finding from the examination of such data that segregation exists in any public school, the Commissioner shall in writing within 30 days after receipt of data notify the local board having jurisdiction over said school that such finding has been made. The Commissioner may after data has been submitted and examined, pursuant to parts 3535.0500 and 3535.0600 determine from additional data received at any subsequent time that a condition of segregation exists and request action to correct the situation. Any local board receiving notification of the existence of segregation shall forthwith prepare a comprehensive plan to eliminate such segregation and shall file a copy of such plan with the Commissioner within 90 days after the receipt of the notification.

If the local board fails to submit a plan within 90 days, the Commissioner shall notify the local board of noncompliance. A reasonable time of 15 days shall be allowed for compliance.

This provision requires the Commissioner to review the racial composition of all schools in the state and make a determination of whether "segregation" exists. It is different from the proposed new rule, which makes a distinction between intentional segregation and racial imbalance, and which also examines many factors beyond simply whether intentional segregation exists. The need and reasonableness for making a distinction between intentional segregation and racial imbalance is examined at length in Sections III. and V.

Notwithstanding these differences, the operation of the proposed rule is comparable to the present rule. The present rule gives the Commissioner the opportunity to request information beyond the racial percentages if it would aid in the administrative review; the proposed rule gives the Commissioner the opportunity to review a variety of specific information, and includes discretion to request additional information as well. The present rule gives the Commissioner 30 days to review the racial data and notify a district that it is beyond the limits of the rule; the proposed rule gives the Commissioner 60 days to review the initial racial data. This is reasonable, because so many more school sites and districts now come within the purview of the rule than in the early 1970's when the old rule was promulgated. Thus, additional staff time will be required to review the data being submitted.

Under the present rule, if a finding of segregation is made, the Commissioner is to notify the district; that is the case under the proposed rule as well, for intentional segregation and for racial isolation. Under the present rule, a district is to file a comprehensive plan to eliminate segregation within 90 days; under the proposed rule, the district is to file a comprehensive plan to eliminate intentional segregation within 60 days. The shorter time frame is reasonable, because under the proposed rule every comprehensive plan filed under this part 3535.0150 will

be remedying a finding of intentional discrimination. Given that the plan is to remedy acts of intentional discrimination, they should be more expeditious.

Finally, if the district fails to submit a plan within 90 days under the current rule, the district is to be notified of non-compliance, but may be given an additional 15 days to come into compliance by filing a plan; under the proposed new rule, if an acceptable plan is not submitted after 60 days, part 3535.0140 requires the Commissioner and the district to design a plan together within 45 days. If that fails, the Commissioner designs a plan. Moreover, the Commissioner may extend the time for responding in those circumstances where it appears that the district is acting and good faith and simply needs more time to propose a plan. This is a reasonable alternative to the rather inflexible time limits specified in the current rule which often districts cannot meet.

F. RULE 3535.0700 STANDARDS FOR DEVELOPING THE PLAN.

The 15 percentage points requirement of part 3535.0200, subpart 4 shall be used as the standard for local school boards in the process of developing plans to remove racial segregation in the district. The Commissioner shall approve school desegregation plans that vary from the standard by up to an additional 15 percentage points if the local board can justify an educational reason for a variance to the state board from the comprehensive school desegregation plan submitted. If the variance is approved by the Commissioner, it may result in a school building exceeding 50 percent minority enrollment if necessary.

An educational reason shall include the effect on bicultural and bilingual programs, making magnet schools available to minorities, effectiveness of school pairing programs, and other educational programs that should result in a better education for the children involved. In determining whether the educational reason put forth by the district justifies the variance, the State Board of Education shall determine whether other alternatives are educationally and economically available to the district such that the variance is not needed.

This part of the present rule is the standard school districts use when developing plans to eliminate "segregation" (i.e. when any school site was more than 15 percentage points above the district-wide average of students of color.) There are several important reasons for its repeal.

First and most importantly, this provision is premised on the conclusion that there is no distinction between racial imbalance and "segregation"; instead, the rule presumes that segregation exists if the 15 percentage point limit is reached, and requires a plan to eliminate that condition. The importance of making a distinction between racial imbalance and legally actionable segregation has been fully discussed in Sections III. and V.

Moreover, there are several reasons why this section does not work, even if there were no need to make a distinction between intentional segregation and racial imbalance. First, this section, and the rule as a whole, make no effort to determine why the condition of so called "segregation" exists. The predominate goal of districts in proposing desegregation plans is to

achieve racial balance; however, since there is no evaluation as to why the imbalance is occurring, it has been very difficult for districts to propose thoughtful plans to eliminate the imbalance. That may be one important reason why districts have resorted to quotas, when the other parts of their plans are not working. Conversely, the proposed rule enables the Commissioner to review data which will enable him or her to determine whether the imbalance was intentionally caused; if it was, the cause will be identified and will be the target of the remedial plan.

Furthermore, as indicated before, the percentages used simply do not advance the goal of greater interracial contact, given the demographics of today. Given that the protected enrollment in the Minneapolis School District is now above 67% for K-6, a school would have to be more than 82% protected students before the rule even applies.[52] Moreover, the rule permits an additional upward variation of 15 percentage points, which means that some schools can be entirely comprised of protected students, and the rule would not apply. Given that demographic reality, it is simply not reasonable to continue with these measurements.

G. RULE 3535.0900 CONTENTS OF THE COMPREHENSIVE PLAN.

The comprehensive plan, submitted pursuant to part 3535.0600, shall contain a detailed description of the actions to be taken by the local board to eliminate segregation. Each plan shall contain: an explicit commitment by the local board to fulfill the requirements of these rules; a detailed description of the specific actions to be taken to correct racial segregation of students and faculty, showing the intended effect of each action proposed with respect to the entire plan, and each specific action proposed in the plan; a timetable showing dates of initial implementation and completion; evidence that broad community participation and involvement was secured in the planning and development of the plan; and specific affirmative proposals to ensure that the integration process provides an effective learning environment for all children based upon mutual cultural and personal respect. The plan shall also include a narrative description of changes in the staffing patterns of the school district, curriculum changes to meet the needs of students in a desegregated environment, any anticipated building or remodeling programs, present and projected attendance patterns, staff preparation or projected in-service training programs. The implementation period shall not exceed two years. The plan shall specify the effect which each proposed action will have on the racial composition of each school within the district which may be expected upon completion of the plan.

The desegregation plan required under the old rule has more than 13 required components. Each one will be examined individually.

1. "An explicit commitment by the local board to fulfill the requirements of the desegregation rules":

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[52] The rule uses the phrase "15 percentage points above the district-wide enrollment"; however, the Department has traditionally used a 15 percent (%) calculation to determine whether a school has exceeded the rule requirement.

Rationale for Change: This requirement is not necessary: an assurance of compliance to fulfill civil rights requirements is contained in Minn. Rules pt. 3535.9910.

2. "A detailed description of the specific actions to be taken to correct racial segregation of students and faculty, showing:

a. each specific action proposed in the plan;
b. the intended effect of each action proposed with respect to the entire plan":

Rationale for change: If it is determined that students are being intentionally segregated on the basis of race, the proposed rule, like the current rule, requires offending districts to propose a plan to remedy the segregation.

Correcting the "racial segregation of faculty" required above is a more difficult requirement. First, the current rule provides no definition for determining when such segregation has occurred; it simply presumes such a finding and requires a remedy. Because there is no standard for evaluating when "segregation" occurs, the rule has not proved workable.

Second, the current rule does not recognize the differing causes for so called "segregation" in faculty assignments. Many collective bargaining agreements provide for faculty assignments based on seniority. This means that often the most senior teachers, who tend to be white, self-select particular schools because of their proximity to home or because of their familiarity. If faculty "segregation" results because of this process, it is arguably not within the Commissioner's authority to implement a rule which would require reassignment solely because of a concentration of white faculty at one or more schools. Implementation of a race-based requirement would arguably conflict with equal protection requirements and might also raise impairment of contract claims. Thus, for all of these reasons, this section has been eliminated.

3. "A timetable showing dates of initial implementation and completion;"

Rationale for change: This section has been replaced with new timelines. See 3535.0150, subps. 1 and 2; 3535.0160, subp. 6; 3535.0170, subp. 6.

4. "Evidence that broad community participation and involvement was secured in the planning and development of the plan;"

Rationale for change: The proposed rule has replaced this more general requirement with the specific requirement that districts use community collaboration councils and multi-district councils to provide input into the planning, development and evaluation of local desegregation plans. The analysis underlying the change to this more specific requirement is contained in the rationale for proposed parts 3535.0160, subps, 2-3 and 3535.0170, subps. 2-3.

5. "Specific affirmative proposals to ensure that the integration process provides an effective learning environment for all children based upon mutual cultural and personal respect;"

Rationale for change: The Commissioner recognizes that for an integration process to be effective, it is necessary for each school to provide programs and leadership which demonstrate the importance of mutual cultural and personal respect. This is such an important component of the educational mission of schools that there is now a separate requirement for this type of curriculum in Minn. Rules pt. 3500.0550 (The Inclusive Education Rule.) This is a more logical rule through which to address these important issues.

6. "A narrative description of changes in the staffing patterns of the school district;"

Rationale for change: This requirement was likely promulgated to help the Commissioner determine whether faculty assignments were being changed based on race. However, as indicated above, it is difficult to put this information to use, since there is no way to determine when or whether faculty segregation has occurred. Instead, the proposed rule gives the Commissioner the authority to gather information relevant to faculty assignments in coming to a conclusion about whether schools as a whole are intentional segregated.

7. "Curriculum changes to meet the needs of students in a desegregated environment;"

Rationale for change: As indicated above, the Inclusive Education addresses this need currently. At the time of writing this document, that rule is being re-worked to address curriculum issues in a more comprehensive way.

8. "Any anticipated building or remodeling programs;"

Rationale for change: It is anticipated that if a building or remodeling program is needed to remedy a finding of intentional discrimination, or to encourage voluntary integration, this information would be included in the plan submitted. It is not necessary to list this as a separate requirement.

9. "Present and projected attendance patterns;"

Rationale for change: This requirement is no longer reasonable or needed. From a reasonableness perspective, requiring districts to project where and how students will attend school has been quite difficult. Districts have had to rely on simple projections based on past attendance patterns, or educated guesses based on waiting lists that may have been compiled.

The requirement is also not needed, now that strict numerical formulae will not be used to determine whether school sites are in compliance with the rule. For these reasons, the requirement that this information be provided has been eliminated.

10. "Staff preparation or projected in-service training programs;"

Rationale for change: The need for staff preparation and training on issues related to inclusiveness and diversity is addressed in the Inclusive Education Rule; it is expected that staff preparation and training issued will be expanded upon in that rule.

11. "The effect each proposed action shall have on the racial composition of each school with the district;"
and

12. "Projections of the racial composition of each school within the district which may be expected upon completion of the plan;"

Rationale for change: See rationale for change under number 9 above.

13. "Implementation of the plan shall not exceed two years."

Rationale for change: This requirement is no longer needed or reasonable. For example, if a finding of intentional segregation is made, some remedies (such as re-drawing attendance lines, or providing additional resources) can be implemented in a very quick fashion, most within the academic year. However, in some cases it might be necessary to require additional construction, or provide other more sweeping changes. Litigation in the area of desegregation demonstrates clearly that it sometimes takes many years to implement a plan that effectively eliminates not only the discriminatory conduct but also the vestiges of that conduct. Therefore, it is not reasonable to arbitrarily impose a time period by which integration will have occurred. Instead, the rule gives the Commissioner the ability to determine whether the remedies and the time frames for implementing them are reasonable. If a district is not proceeding at a pace which is appropriate, the Commissioner also has the authority to intervene and propose an alternative plan.

H. RULE 3535.1100 DESEGREGATION CONSIDERATIONS FOR NEW SCHOOL SITES

All decisions by local boards concerning selection of sites for new schools and additions to existing facilities shall take into account, and give maximum effect to, the requirements of eliminating and preventing racial as well as socioeconomic segregation in schools. The Commissioner will not approve sites for new school building construction or plans for additions to existing buildings when such approval will perpetuate or increase racial segregation.

On the surface, the requirement of this language seems very reasonable and compelling; however in its implementation it has proven to be difficult and actually unfair to the very groups of students it is designed to protect.

Increasingly, educators, students and parents of all races are articulating the importance of neighborhood schools to promote greater parental involvement and student success. Courts have consistently held that the concept of a neighborhood school system, (absent a showing of discriminatory purpose) does not offend the Constitution. See e.g., Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 n.15, 102 S. Ct. 3211,3217-18 n.15 (1982); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28, 91 S. Ct. 1267, 1282 (1971); Thompson v. School Board, 465 F.2d 83 (4th Cir. 1972), cert. denied, 413 U.S. 920 (1973); Riddick v. School Board, 784 F.2d 521 (4th Cir. 1986) cert. denied, 479 U.S. 938 (1986). Congress long ago passed legislation which noted the primary of neighborhood schools in providing these benefits. See 20 U.S.C. §1701.

The Minneapolis School District itself determined that busing students out of their neighborhoods to achieve racial balance was having a detrimental effect upon the involvement of parents in their children's education. Moreover, parents of all races expressed a desire to return to community schools. See Quality Schools Study, Ex. 34. And yet, returning to neighborhood schools required that Minneapolis build new school sites in neighborhoods with greater concentrations of non-white students and poorer students.[53] The meant locating schools in neighborhoods with greater concentrations not only of protected students, but also students in "poverty". The rule language above runs counter to such an initiative.

If the State were to adhere to the rule as presently stated, building new neighborhood schools to serve growing numbers of protected or even poor students would be prohibited; however, it would have a disproportionate impact on students of color, who often live in areas of greater population growth. In short, if the State believes in the importance of neighborhood schools as an option, the rule as it is presently worded makes it difficult to provide this option to students of color or students with a lower socio-economic status. On balance, the Board and the Commissioner believed that districts, parents and students should have the option of utilizing neighborhood schools as one of several educational options.

However, the new rule does provide protection against racial isolation by requiring that districts provide guaranteed access to more integrated settings for students who attend schools which are more than 90% students of color, or more than 25% above the district-wide average of such students. This will provide an option to attend an integrated setting, while at the same time allowing for the option to provide neighborhood schools to those who wish to attend them.

I. RULE 3535.1200 CONSIDERATION OF EQUITY IN DEVELOPING THE PLAN.

All plans to effect school desegregation and integration shall be equitable and nondiscriminatory. Within the constraints imposed by feasibility and educational soundness, inconvenience, or burdens occasioned by desegregation shall be shared by all and not borne disproportionately by pupils and parents of minority group students.

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[53] This was because 18 neighborhood schools had been closed during the late 1970's and early 1980's in an effort to disperse protected students attending racially isolated schools.

While this particular language is being repealed, the notion that protected students should not be disproportionately impacted by desegregation has been retained in the proposed rule. For example, in determining whether there is a discriminatory purpose behind a particular concentration of protected students at a school, one of the considerations is "whether the racial composition of the school is the result of acts which disadvantage one race more than another, as for example when protected students are bused further or more frequently than whites." Because the rule does not state a particular number for determining when racial balance has been "achieved", there is no reason to address whether protected students are being disadvantaged by voluntary measures; participation in those measures will be up to the individual students and their parents.

J. RULE 3535.1300 NO USE OF PUPIL GROUPING OR CLASSIFICATION

Local boards shall not adopt or maintain pupil grouping or classification practices, such as tracking, which result in racial segregation of pupils within a given school.

This rule is duplicative the Minnesota Human Rights Act, Minn. Stat. §363.03 subd. 5 (1996) which makes it an unfair discriminatory practice "to discriminate in any manner in the full utilization of or benefits from any educational institution, or the services rendered thereby to any person, because of race." Furthermore, the current rule language does not define "racial segregation of pupils within a given school"; thus, from an implementation standpoint, it is not possible to determine when the rule has been violated. For both reasons, the provision has been eliminated.

K. RULE 3535.1500 REVIEW OF THE PLAN BY THE COMMISSIONER

The Commissioner shall review any plan or amendment submitted under these provisions and shall determine whether it complies with the requirements of these rules. If the Commissioner determines that the plan will eliminate segregation in the schools of the district submitting the plan, and that the dates for implementation of the plan will not exceed two years, and that any proposed transportation to achieve desegregation is not restricted to minority students, the Commissioner shall approve the plan and notify the State Board of Education and the local board within 30 days. The Commissioner may provide to the local board of education such technical assistance and services as requested by the local board and deemed necessary by the Commissioner in order to implement the plan. If the Commissioner finds that the plan will not eliminate segregation in the schools of the district submitting the plan, or that the dates for implementation will exceed two years or that any transportation to achieve desegregation is restricted to minority students, the Commissioner shall reject the plan.

This language is consistent with the proposed rule (see parts 3535.0150, subp. 1; 3535.0160, subp. 4 and 3535.0170, subp. 5). The major difference is the distinction between intentional segregation and racial imbalance, and how those two conditions are to be addressed. The rationale for these distinctions has been discussed previously.

L. RULE 3535.1700 NOTIFICATION OF FAILURE TO COMPLY.

If no revised plan is received within 45 days, or if the revised plan fails to contain the revisions specified by the Commissioner, or if the plan fails to meet the requirements of parts 3535.0200 to 3535.2200 the Commissioner shall notify the local board of action to be taken pursuant to part 3535.0400.

This section is consistent with the language of proposed 3535.0150, subp. 4, which provides that if a district fails to submit data required by the Commissioner, fails to provide and/or implement a plan to remedy intentional segregation, or fails to implement a plan developed by the Commissioner, one or more of three enforcement actions will be commenced. The new language provides greater clarity about the nature of the actions which may be commenced by the Commissioner.

M. RULE 3535.2000 APPEARANCE BEFORE THE STATE BOARD

Any school district aggrieved by a decision required by the Commissioner by part 3535.0200 to 3535.2200 may serve a written request on the State Board of Education within 30 days of any such decision to appear before said board.

The appearance shall be made at the next regular state board meeting following receipt of such request. Following such appearance the board may in writing support, modify, or reject the Commissioner's decision. Any such notice served by a school district shall stay any proceeding pursuant to Minnesota Statutes 1971, Section 124.15 to reduce state aids for non-compliance with parts 3535.0200 to 3535.2200 until a determination by the board.

This section is being repealed because after December, 1999, the State Board of Education will no longer exist. (1998 Minn. Laws ch. 398, art. 6, §38)

VII. REGULATORY ANALYSIS

A. Introduction

Minnesota Statutes §14.131(1996) as amended by 1998 Minn. Laws ch. 303, §§1 and 4 requires the Statement of Need and Reasonableness to include the following information on classes of persons affected by the rules, costs and alternatives considered.

1. **A description of the classes of persons who will probably be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

The proposed Desegregation Rule is one of three rules (the others being the Inclusive Education Program Rule and the Graduation Standards Rules) that impact students, parents and districts. Together these rules are designed to improve the educational environment for all Minnesota students.[54] While the proposed Desegregation Rule will affect all school districts in the state by requiring districts to submit data under part 3535.0120, most districts will not have further responsibilities under the proposed rule and students in those districts will not be affected.

However, some will be affected. For example, if any districts are found to have intentionally segregated, a plan to remedy the segregation is required. Students in those districts could be affected by the requirements of the desegregation plan, which could involve changes in student assignments to remedy the problem.

In districts that have racially identifiable schools (see Ex. 35) a desegregation plan designed to provide incentives for voluntary integration will be required. This will affect district administrators and those community members who are selected to be a part of the collaboration council planning process. It will affect students and parents to the extent that they chose to avail themselves of different integration opportunities. Fall 1997 enrollment data shows seven districts having between 1 to 18 school sites identified as "racially identifiable".

Similarly, in a district that is racially isolated, or in districts which adjoin a racially isolated district, administrators will likely be assigned to oversee planning and implementation of cross-district efforts. Fall 1997 enrollment data identified 7 such districts with 26 adjoining districts. See Ex. 36.

Community members who serve on the multi-district collaboration councils will also be involved in goal setting and planning for the inter-district plan. Again, this portion of the rule will affect students and parents to the extent that they choose to participate in cross-district efforts.

The classes that will bear the cost of the proposed rule are school districts, by virtue of data collection, reporting, planning and implementation cost, and the state, which will monitor districts for racial isolation and intentional segregation and review district plans.

Students in districts engaged in voluntary integration efforts will benefit from increased educational choices, such as magnet schools, and from the removal of barriers to some school sites as a result of the current use of racial quotas as a means of achieving racial balance. Students and districts alike will benefit from greater flexibility in assignments.

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[54] The Desegregation rule is designed to provide non-discriminatory access to education; the Inclusive Education Program Rule is designed to help districts deliver effective education; and the Graduation Standards rules are designed for accountability of the systems.

In some sense, all Minnesotans will benefit from the proposed rule because of its emphasis on providing more options for integrated school settings. Increasing opportunities for students of color and providing more opportunities for students to interact with students from other cultures is an important policy goal.

2. The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The proposed rules require the review of data, the review of various school district information and plans required to be submitted to the Commissioner. These include the information that may be requested to determine intentional segregation, the plans to remedy segregation, the plans to provide options to help integrate racially identifiable schools and the plans to describe inter-district integration efforts to be implemented by racially isolated districts and their adjoining districts.

These provisions of the proposed rules will cause some additional costs to DCFL for staff to carry out these new responsibilities. The estimated cost of 2 additional professional staff and 2 additional clerical staff and minor operating costs is $228,000 per year in F.Y. 2000 and in F.Y. 2001. Details of probable costs to the agency are provided in Appendix A.

There is no probable cost to any other state agency. There is no anticipated effect on state revenues.

3. A determination of whether there are less costly or less intrusive methods for achieving the purpose of the proposed rule.

Because the rule is incentives-based and voluntary, it is difficult to argue that there are less intrusive means to achieve the purpose of the proposed rule.

One way of reducing the cost of the proposed rule would be to increase the triggering percentage for determining when a school is racially identifiable, and when a district is racially isolated. Obviously, the more sites and districts that are required to organize and implement integration plans, the more the rule will cost.

Throughout a great deal of the rule discussion, the Board used 15% as a trigger. In April, 1997, the Board received an analysis of the costs related to three separate sets of triggers; 15%, 20% and 25%. See Ex. 37. The Board and thereafter the Commissioner determined to use the 20% trigger, in part because it was less costly.

4. A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the State Board of Education and the reasons why they were rejected in favor of the proposed rule.

The rules now being proposed have been evolving over the past several years and are the product of much discussion and debate from various stakeholder constituencies. Although many

drafts have been considered, the 1995 Roundtable Draft is the "alternative" that was "most seriously considered."

In the summer of 1989, the Board expanded on preliminary discussions with leaders from various communities of color by convening an eight-member task force to examine issues and possible new desegregation approaches. In May 1990, the Board expanded the composition of the task force and formally convened it as the Desegregation Policy Forum, with Curman Gaines of St. Paul and Jean Olson of Duluth as co-chairs. In November 1990, the Desegregation Policy Forum submitted a report to the Board. See Ex. 2.

In the spring of 1992, after 12 public meetings on the Policy Forum and its report the Board convened an ad hoc advisory committee to assist in the drafting of a new desegregation rule. The Board discussed preliminary drafts over a period of several months. In November 1992, the Board adopted a preliminary draft of proposed desegregation rules for public dissemination, which focused primarily on educational results, rather than racial balance. From November to December 1992, there was substantial public discussion and debate regarding that very preliminary draft.

In the spring of 1993, the legislature adopted legislation that required the State Board to convene a "Desegregation Roundtable." The Roundtable was asked, among other things, to develop recommendations on the proposed changes to the desegregation rule that would affirm the principles of Brown v. Board of Education. It was also to review the state's "desegregation and inclusive education rules," and to recommend ways to improve them. See Ex. 3 (1993 Minn. Laws, ch. 224, Art. 9, §46).

In August 1993, after considering how to revise the rule, the Board adopted a set of working principles. Those are attached as Ex. 4. The Roundtable met several times and thereafter drafted new rules, which about 30 of the metro area's schools superintendents endorsed. In February 1994, the SBE approved the rules as a working draft and sent them to the legislature requesting authority to promulgate them. See Ex. 38.

In May 1994, the legislature passed enabling legislation that gave the State Board authority to enact new desegregation rules.[55] However, the legislature did not pass all the legislation necessary to promulgate the rules in the 1994 Roundtable version. Importantly, the legislation did not include a provision requiring that districts closed for open enrollment purposes be forced to admit protected class students from Minneapolis regardless of space; it did not give the State Board the authority to reconstitute schools and it did not give the Commissioner the authority to assume control of schools that failed to close the learning gap. Furthermore, the legislation did not authorize the Board to address learning outcomes, but rather only "equal educational opportunities". Finally, although the Roundtable's 1994 draft clearly required districts to provide cross-district opportunities, the legislature did not give the State Board of Education the authority to order cross-district busing.

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[55] See 1994 Minn. Laws ch. 647, art. 8, sec. 1 (Ex. 6). That legislation provided the authority for the State Board of Education to propose a desegregation rule. As discussed above, in 1998 that authority was transferred to the Commissioner. See 1998 Minn. Laws, ch. 198, art. 5, §7.

During the spring and fall of 1994, the State Board discussed how the rule draft might be revised, in light of the 1994 legislative directives. In January of 1995, the Desegregation Roundtable submitted updated recommendations to the Board in light of these directives. Moreover, the Department of Children, Families and Learning presented an alternative approach to the Roundtable proposal. That alternative is attached as Ex. 7.

In February 1995, the State Board approved a revised preliminary draft based primarily on the Roundtable's draft proposals and sought more public discussion on the issue. The rule was also given to legal counsel. The DCFL continued to suggest a different approach than that proposed by the Roundtable. In the fall of 1995, the Republican caucus issued an analysis of the Roundtable draft that was highly critical. See Ex. 8. Also, in the fall of 1995, the State Board accepted the Department's recommendations and began consideration of what evolved into the rule now being proposed.

The 1994 and 1995 drafts are included as Exs. 38 and 39. The 1995 Roundtable Draft most closely embodies a 'description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency". Minn. Stat. §14.131(4). A detailed discussion analyzing why the 1995 Roundtable draft was considered but not ultimately proposed is found in Appendix B. The analysis also points out those provisions which were retained and reasons for omitting those portions which were not retained.

5. Probable costs of complying with the proposed rules.

The estimated costs of complying with the proposed rules will be borne by school districts and by the State. The proposed rules include provisions that apply to all public school districts in the State; these provisions require the reporting of data already collected and reported and will have little cost impact to districts or to the state.

The proposed rules also include provisions that are triggered by specific demographic percentage relationships; these provisions will affect only a few districts at this time. Based on 1997 Fall enrollment data compiled by DCFL, it is estimated that a total of 35 school districts will be affected by provisions requiring a collaboration council to meet and develop and submit a plan to the Commissioner of DCFL. The probable costs to the school districts involved will vary based on the size of the district and the numbers of school buildings and adjoining districts required to participate; therefore, estimates are given in ranges. The total probable costs to all affected districts in the state are estimated for school year 1999-2000 to be $181,000 to $444,000 and for school year 2000-2001 to be $181,000 to $444,000.

The proposed rules also include the requirement that the plans submitted by the affected school districts include integration efforts that the district plans to implement in the case of racially identifiable school building sites and inter-district integration efforts the district plans to implement in the case of racially isolated districts. The proposed rules permit districts to select various options to develop the required plans. Each option would have a different financial impact on each affected district. The ranges of probable costs for the options given as examples for possible inclusion in such district plans in the proposed rules are given in Appendix A.

Finally, no estimates of probable cost to school districts or to the state agency are included for the finding and remedy of segregation as a result of discriminatory purpose. The Commissioner and the State Board have never made a finding of intentional segregation in public school districts and no such cases are anticipated. If there were to be such a finding and a remedy were required it could be very costly to the district; for example possible remedies could include new school buildings and increased transportation. Probable costs to the state could be significant. While such a finding of segregation would cause significant costs to a district and to the state, it is not possible to estimate these probable costs due to the large number of variables in such a situation. There could be extreme differences in costs on a case by case basis.

Details of the probable cost to school districts of complying with the proposed rules are given in Appendix A.

6. An assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

The only difference between the proposed rule and existing federal standards (as opposed to regulations)[56] is that the proposed rule combines a category of protected class students and includes a "multi-racial" category for collecting racial and ethnic data

The federal standards (adopted a little over a year ago) provide for the following 5 categories of race and ethnicity: White; Black; Asian; Native Hawaiian or other Pacific Islander; Hispanic or Latino; and American Indian or Alaskan Native. See Ex. 40. The major difference between the rule as proposed and these standards is that in the proposed rule, the categories of Asian/Pacific Americans are combined, and there is no separate category for "Native Hawaiian". The need and reasonableness of keeping the earlier categories is to provide continuity for users of the rule.

The new federal standards allow for self-reporting of a multi-racial status, as long as the reporting is not simply based on a "multi-racial" category. Instead, the self-report should include a multiple response question that enables the respondent to mark him or herself in one or more of the above-referenced racial classifications. As long as districts are instructed to follow this methodology, there is not an implementation difference in the rule as proposed and in the new federal standards.

7. How the Commissioner considered and implemented the legislative policy supporting performance-based regulatory systems in 1998 Minn. Laws ch. 303, §§1 and 4.

1998 Minn. Laws ch. 303, §1 provides as follows:

> ...whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory

[56] For purposes of this section, it is assumed that the reference in Minn. Stat. § 14.131(6) to "federal regulations" includes federal standards as well.

objectives and maximum flexibility for the regulated part and the agency in meeting those goals.

Section 4 of that chapter goes on to require the following in the statement of need and reasonableness:

> Both achievement of regulatory objectives and flexibility have been built into the rules being proposed. The statement must describe how the agency, in developing the rules, considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002.

The objectives of the proposed rule were twofold:

1) to monitor for and promptly eliminate intentional segregation;

2) to monitor trends towards racial isolation in sites and districts, and provide a system that develops integrated options in response. The rule accomplishes both objectives.

Furthermore, the rule provides a great deal of flexibility to districts in identifying integration issues that must be addressed, and in determining how best to address those issues. Similarly, the rule gives parents and students real opportunities to choose integrated options if that is their choice. If however that is not the primary goal of the parents and students as they identify their educational priorities, and if students would rather attend a school for other reasons, such as programming or proximity to home, that is also still an option.

VIII. ADDITIONAL NOTICE PLAN

In accordance with Minn. Stat. §14.14 and Minn. Rules pt. 1400.2060, the Commissioner developed and submitted an additional plan notice for prior approval by the Office of Administrative Hearings. The Notice of Intent to Adopt Rules and the Order for Hearing were mailed to the following, according to the approved plan:

a) all Superintendents of public school districts (368);

b) Statewide Educational Organizations (66);

c) Commissioner's Desegregation/Integration Advisory Board;

d) State Multicultural Education Advisory Committee;

e) public libraries statewide for posting (350);

f) Student Council Presidents in high schools statewide (400);

g) All local school district parent organizations (PTA/PTO) (1500);

h) Selected parent advisory groups in the school districts affected by the proposed rules;

i) Minnesota State Legislators; members of the Senate Education Committee, Senate Education Division K-12 Funding; House Education Committee, House K-12 Education Finance Division;

j) State Board of Education members

k) Star Tribune and St. Paul Pioneer Press and eight selected newspapers published primarily for various communities of color (La Voz, La Prenza, The Spokesman, Insight News, Asian Pages, Asian-American Press, The Circle and Native American Press);
(an abbreviated notice of hearing will be published); and

l) The Notice and the proposed rules will be posted on the DCFL Web site address at http://cfl.state.mn.us

IX. COMMISSIONER FINANCE REVIEW OF CHARGES

Minn. Stat. §16A.1285 subd. 4 (1996 and Supp. 1997) does not apply because the rules do not set or adjust fees or charges.

X. OTHER REQUIRED INFORMATION

A. Citations to any economic, scientific, or other manuals or treatises relied on by the Commissioner. (Minn. Rules pt. 1400.2070, subp. A.)

See Bibliographies 1,2, and 3.

B. Citations to any statutes or caselaw relied on by the Commissioner. (Minn. Rules pt. 1400.2070, subp. B)

See Bilbliography 1.

C. An explanation of what effort the Commissioner made to obtain any information that he states could not be ascertained through reasonable effort. (Minn. Rules pt. 1400.2070, subp. C)

There was no information required that could not be ascertained.

D. Information required by any other law or rule to be included in the statement, or which the Commissioner is required by law or rule to consider in adopting a rule.

None.

XI. WITNESSES

The following individuals will testify on behalf of the Commissioner and the Department of Children, Families & Learning.

1. David Beaulieu, former Minnesota Director of Indian Education and former Minnesota Commissioner of Human Rights, will testify on the need and reasonableness of the provisions in the proposed rules that address American Indian students.

2. Frank Bennett, Chair of the West Metro Education Partnership (WMEP) Board and an Edina school board member, will testify about how the proposed rules will impact districts belonging to WMEP.

3. Jeanne Kling, President of the State Board of Education, will testify on the State Board's consideration of the recommendations of various groups, demographic studies, data and the reasonableness of proposed rules.

4. Mary Lach, a parent of a student in the Stillwater Public School District's Project Common Ground will testify from the perspective of a student and parent who have experienced participating in an integration program option.

5. Tom Melcher, Department of Children, Families & Learning, Program Finance Manager, will provide an overview of the estimates of probable costs from the regulatory analysis required for the proposed rule.

6. Christine H. Rossell, Professor Political Science Department, Boston University, will testify about the effectiveness of voluntary integration measures and the lack of correlation between desegregation efforts and academic achievement. Ms. Rossell is an expert in the field of desegregation/integration.

7. Vincent Schafer, superintendent of the Madelia Public School District, will testify on the reasonableness of the proposed rules for a small, rural school district.

8. Alice Seagren, member of the MN House of Representatives, will testify on the need to change the current rules and move away from a "quota" based policy.

9. Heida Vlasek, parent of a student in the Tri-District School (St. Paul, Roseville, and North St. Paul-Maplewood) will testify from the perspective of a student and parent who have experienced participating in an integration program option.

10. Robert Wedl, Commissioner of the Department of Children, Families & Learning, will provide an overview of the proposed rules.

XII. LIST OF EXHIBITS

EXHIBIT NUMBER	DESCRIPTION OF EXHIBITS
1.	State Board of Education's certified Desegregation Rule (Dec., 1997)
2.	History of SBE Desegregation Activities
3.	1993 Minn. Laws, ch. 224, art. 9, §46
4.	1993 State Board of Education working principles
5.	1993 Minneapolis School District Desegregation Plan
6.	1994 Minn. Laws, ch. 647, art. 8 §1
7.	DCFL Alternative Approach to Roundtable Proposal (1995)
8.	Republican Caucus Analysis of Roundtable Draft (1995)
9.	Chart describing rules and/or statutes in 39 of other 49 states
10.	1978 SONAR
11.	League of Women Voters, "Metropolitan School Desegregation & Integration Study"
12.	Fall '97 DCFL Minority Enrollment Comparison Report
13.	DCFL, 1996-97 Minority Enrollment Comparison Report
14.	Findings of the State Board of Education
15.	Minnesota Education Directory, 1997

16. Findings of the Commissioner of Education

17. New Federal Magnet School Grant Regulations

18. Memo by Walter Dellinger, 6/28/95

19. Roe v. Houston Independent School District: Complaint

20. Indian School Councils' Preliminary Report to Minnesota Legislature, 1988

21. Revised Federal Standards on Race and Ethnicity

22. Testimony of Ted Suss

23. Testimony of Tom Melcher

24. Testimony of Joel Sutter

25. Testimony of Mark Misukanis

26. Testimony of Gil Valdez

27. Testimony, including credentials, of James Guthrie

28. Affidavit of Michele Wolf

29. Memo to SBE outlining concerns of American Indian community

30. Chart showing how many American Indian students live within ten miles of Indian reservations

31. May 9, 1996 Memorandum to State Board of Education

32. Chart showing enrollments of American Indian/White student enrollment

33. Letters from school districts on geographic exemption

34. Quality Schools Study

35. Chart showing racially identifiable school sites

36. Isolated/Adjoining Districts Affected by Rule

37. Chart showing districts affected by different "triggers"

38. Roundtable Draft (1994)

39. 1995 Roundtable Draft

40. 1997 Federal Standards on Race and Ethnicity

41. Order in the Booker case

42. Gary Orfield, "Desegregation and Educational Change in San Francisco"

43. Minneapolis Public Schools Elementary Achievement Scores in Reading and Math 1994-95

44. Districtwide test results

45. Projection of Racial Composition of Schools in Minneapolis School District

CONCLUSION

Based on the foregoing, the proposed rules are needed and reasonable, and the current rules should be repealed.

Dated: November 24, 1998

Signed: _____
Robert J. Wedl
Commissioner

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APPENDIX A

Report of Estimated Probable Costs for Implementation and Enforcement of Proposed Rules Relating to Desegregation (Minnesota Rules 3535.0100 – 3535.0180)

Prepared by the

Department of Children, Families & Learning

November, 1998

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INTRODUCTION

The purpose of this cost analysis is to provide an estimation of probable costs relating to the implementation and enforcement of proposed rules Minn. Rules parts 3535.0100 to 3535.0180 relating to desegregation. This report is the basis of estimating the probable costs of these proposed rules in accordance with provisions of Minnesota Statutes §14.131.

The proposed rules include provisions that apply to all public school districts in the state; these provisions require the reporting of data already collected and reported and will have little cost impact to districts or to the state.

The proposed rules include provisions that are triggered by specific demographic percentage relationships; these provisions will affect very few districts within the state. Based on 1997 Fall enrollment data collected by Department of Children, Families & Learning (DCFL), it is estimated that a total of 35 school districts will be affected by provisions requiring collaboration councils to meet and develop and submit plans to the Commissioner of DCFL. The costs to the school districts involved are estimated in this report as well as the cost to the state agency, DCFL, for reviewing data and plans. The estimates included are for school years 1999-2000 (F.Y. 2000) and 2000-2001 (F.Y. 2001), which are the first two years that the proposed rules will be in effect.

The proposed rules also include the requirement that the plans submitted by the affected school districts include integration efforts that the district plans to implement in the case of racially identifiable school building sites and inter-district integration efforts the district plans to implement in the case of racially isolated districts. The proposed rules permit districts to select various options to develop the required plans. Each option would have a different financial impact on each affected district. This report provides ranges of probable costs for the options given as examples for possible inclusion in such district plans. Actual estimates of the probable cost to any one district is not possible because of the choices districts are allowed under the proposed rules.

Finally, no estimates of probable cost to school districts or to the state agency are included for the finding and remedy of segregation as a result of discriminatory purpose. The Commissioner and the State Board of Education have found no prior cases of intentional segregation in public school districts and no such cases are anticipated. If there were to be such a finding and a remedy were required it could be very costly to the district; for example possible remedies could include new school buildings and increased transportation. Probable costs to the state could be significant if litigation were to be involved. While such a finding of segregation would cause significant costs to a district and to the state, it is not possible to estimate these probable costs due to the large number of variables in such a situation. There could be extreme differences in costs on a case by case basis.

The cost estimates in this report are based on data supplied by DCFL and by selected school districts.

The cost estimates in this report are for new, additional costs attributable to the proposed rules that are beyond the current district spending on desegregation/integration activities. However, data on current spending is provided in this report as a point of reference.

ANALYSIS OF PROBABLE COSTS FOR IMPLEMENTATION AND ENFORCEMENT OF PROPOSED RULES RELATING TO DESEGREGATION

Minn. Stat. §14.131 (2) and (5) (1996 and Supp.1997) and Minn. Rules pt. 1400.2070 subp. 2 (1996) require an estimation of "the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues" and furthermore requires an estimation of "the probable costs of complying with the proposed rule." This document provides further detail to the totals referenced in section VII of the Statement of Need and Reasonableness.

According to previous research concerning the costs of desegregation in Minnesota,[1] two major lessons flow from experience with school desegregation plans.

1. Each desegregation plan is unique to individual school districts and a plan should be developed by school district personnel, local school boards and the community members closest to the situation; and

2. The effectiveness of each individual school site plan and the district's plan calls for continuous plan review and program monitoring at both the local and state levels.

Therefore, the cost of desegregation/integration plans will vary from district to district depending on local costs and changing conditions. The probable cost of any particular desegregation/integration plan is difficult to predict because it will be determined by individual school sites and school district judgments about services and opportunities to be offered to students and families. These decisions are best made by local school and community leaders.

Thus, the following analysis does not provide a total cost for all desegregation/integration plans, but instead provides an outline of projected additional costs of implementing individualized integration plans that school sites and districts may develop to address local needs in compliance with the proposed revisions to Minn. Rules pts. 3535.0200-3535.2800. Because of the wide variety of plans and related costs that would be associated with desegregation/integration plans, this analysis also addresses the potential planning costs that

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[1] Leonard Stevens, Michael H. Sussman, Meyer Weinberg, David L. Cotton, Joseph T. Murray, Peter P. Horoschak, Glen G. Ivory, et al., Study of School Desegregation/Integration Costs in Minnesota, Minnesota State Board of Education, 1988, Volume 1, p.5.

could be incurred in the development of a school desegregation/integration plan and provides cost projections for monitoring and compliance functions required by the state under the proposed rule. The cost projections are in addition to the current spending that school districts and the State of Minnesota incur to address integration under the current version of Minn. Rules pts. 3535.0200-3535.2800.

The following analysis is organized by section of the proposed rules and by state costs and school district costs. The analysis assumes that the rule is passed in the 1998-99 (F.Y. 99) school year and the first year of implementation is the 1999-2000 school year (F.Y. 2000). It is, furthermore, assumed that planning for implementation will continue through the 2000-01 (F.Y. 2001) school year. Therefore, planning costs are assumed to be required for at least the first two years after the adoption of the new rule, that is, 1999-2000 (F.Y. 2000) and 2000-2001 (F.Y. 2001) school year.

State agency costs are based on staffing estimates provided by the Minnesota Department of Children, Families & Learning, Office of Teaching and Learning. District costs include estimates provided to the Department by selected school districts, including Minneapolis, St. Paul, Duluth, Robbinsdale, Roseville and St. Louis Park.[2]

After several reviews of materials and data provided by school districts, some unanswered questions remain. For example, it was not possible to precisely predict costs for each of the desegregation incentives suggested in the proposed rule. As a result, cost ranges are provided for the various integration strategies suggested by the proposed rule. These costs ranges are based on estimates provided by state and school district staff. This cost analysis is based on the Fall, 1998 draft of the proposed rule and subsequent conversations with the executive director of the State Board of Education and staff from the Minnesota Attorney General's Office, Minneapolis and St. Paul school district administrators, and other metropolitan school district personnel.

The cost analysis is organized by section of the proposed rule.

I. PRESENT SCHOOL DISTRICT SPENDING UNDER MINN. RULES 3535.0200-.2800 (CURRENT RULE).

Under Minnesota Rules pts. 3535.0200-.2800, a desegregation plan is required in any school district when the number of students of color in a building exceeds by the entire student of color population in a district by more than 15 percentage points. Also under the current rule, the desegregation plan must specify the manner and methods by which a district will limit the percentages of majority students and students of color in those buildings. The Duluth,

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[2] In addition, the Department held several meetings with district representatives from various districts.

Minneapolis, and St. Paul school districts are currently subject to this rule.[3] Eligible districts must maintain an approved comprehensive desegregation/integration plan. Categorical funding is provided for the added costs of desegregation efforts. Students participating in integration programs also generate general education funding for the school district.

Most of the categorical funding for desegregation efforts prior to the 1998-99 school year (F.Y. 1999), came from three programs: Targeted Needs Integration Aid (Minn. Stat. §124.312 subd. 5), the Rule Compliance Levy (Minn. Stat. §124.912 subd. 2 and subd. 3.)[4] and the integration transportation revenue (Minn. Stat. §124.225, subd. 15). This revenue is based upon a formula for Duluth, Minneapolis, and St. Paul School Districts. Integration transportation funding for F.Y. 1996 and earlier was included in the pupil transportation funding formula (Minn. Stat. §124.225). Integration transportation revenues for F.Y. 1999 and thereafter are combined with program funding within Minn. Stat. §124.315. Transportation grants were provided to school districts for interdistrict transportation starting in F.Y. 1996.

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[3] The Department is also in the process of reviewing other districts' compliance with the rule.

[4] 1997 Minn. Laws, First Special Session, chapter 4, article 4, §18, created a new Integration Revenue program (Minn. Stat. §124.315) for the 1998-99 (F.Y. 1999) school year and thereafter for districts that are required to establish programs under a desegregation plan mandated by the State Board of Education or under court order. This funding provision combines program and transportation revenues. The purpose of the integration revenue is to reduce the learning gap between learners living in high concentrations of poverty and their peers.

Districts are required to maintain separate accounts for the tracking and reporting of revenues, expenditures, salaries and programs related to this program.

The new law (Minn. Stat. §124.315) lists specific integration revenue for Minneapolis ($523 per pupil unit), Duluth ($193 per pupil unit), and St. Paul ($427 per pupil unit) school districts. In addition, the new law provides revenue equal to the lesser of the actual cost or $93 per pupil unit for other districts that are required to implement a plan according to the requirements of Minnesota Rules, Part 3535.0200 to 3535.2200.

Funding for this new program (Minn. Stat. §124.315) is provided through a combination of state aid and levy. Districts may levy an amount equal to 46 percent of the district Integration Revenue as defined above and a district's integration aid equals 54 percent of the district's Integration Revenue from the 1999 fiscal year. The state aid portion of the Integration Revenue will increase to 67% in F.Y. 2000 and will increase, again, to 78% in F.Y. 2001 and thereafter.

Integration Revenue is adjusted for students attending a nonresident district under an alternative attendance program, if the enrollment of the student in a nonresident district contributes to desegregation or integration purposes.

The following charts and related information provide important background data about current desegregation/integration funding.

The chart reflecting enrollment information for Duluth, Minneapolis and St. Paul school districts is provided because revenues for most school district funding formulas are based upon student enrollment.

ENROLLMENT

STUDENT ENROLLMENT DATA FOR MINNEAPOLIS, ST. PAUL AND DULUTH

School year:	F.Y. 95 1994-95	F.Y. 96 1995-96	F.Y. 97 1996-97	Estimated F.Y. 98 1997-98
Districts with Desegregation Plans:	3	3	3	3
Students Enrolled:				
Duluth	13,837	13,872	13,751	13,690
Minneapolis	44,525	46,236	47,068	49,920
St. Paul	40,751	42,719	43,604	45,360
Percent Students of Color:				
Duluth	8.5%	9.5%	10.0%	10.6%
Minneapolis	61.0%	63.4%	65.5%	67.8%
St. Paul	51.9%	52.9%	57.4%	60.5%

REVENUES

SUMMARY OF INTEGRATION FUNDING FOR MINNEAPOLIS, ST. PAUL AND DULUTH SELECTED PROGRAMS

	F.Y.95 1994-95	F.Y. 96 1995-96	F.Y. 97 1996-97	Estimated F.Y. 98 1997-98
Duluth				
Targeted Needs Integration Aid	$1,385,000	$1,385,000	$1,385,000	$1,385,000
Rule Compliance Levy	1,343,257	1,184,273	1,460,895	1,460,895
Integration Transport. Revenue	334,663	309,104	181,518	193,348
Interdist. Integration Trans. Grants	N/A	-0-	-0-	-0-
Total	**$3,062,920**	**$2,878,377**	**$3,027,413**	**$3,039,243**
Minneapolis				
Targeted Needs Integration Aid	$9,368,300	$9,368,300	$9,368,300	$9,368,300
Rule Compliance Levy	9,425,039	9,792,962	9,996,951	10,420,199
Integration Transport. Revenue	12,498,521	14,330,998	16,284,540	16,568,140
Interdist. Integration Trans. Grants	N/A	-0-	-0-	35,853
Total	**$31,291,860**	**$33,492,260**	**$35,649,791**	**$36,392,492**
St. Paul				
Targeted Needs Integration Aid	$8,090,700	$8,090,700	$8,090,700	$8,090,700
Rule Compliance Levy	8,423,058	9,391,980	9,769,744	9,918,015
Integration Transport. Revenue	6,363,197	6,449,966	8,043,345	8,066,835
Interdist. Intregration Trans. Grants	N/A	56	90,887	171,722
Total	**$22,876,955**	**$23,932,702**	**$25,994,676**	**$26,193,272**

SUMMARY OF CATEGORICAL FUNDING FOR DESEGREGATION 1994-95 THROUGH 1997-98

	F.Y. 1995 94-95	F.Y. 1996 95-96	F.Y. 1997 96-97	F.Y. 1998 97-98(Est.)
Targeted Needs Aid And Levy	$38,035,354	39,213,215	40,071,590	41,323,100
Integration Transport. Rev.[1]	19.196,381	21,090,068	24,509,403	24,828,323
Transportation Deseg. Grants	N/A	16,115	164,676	364,141
Magnet School Grants for Planning & Developing Magnet Schools & Programs	1,500,000	1,500,000	1,500,000	250,000
Integration Programs for Minority Fellowship Grants Minority Teacher Incentives, Teacher of Color, & Cultural Exchange Grants	1,103,600	1,000,000	1,000,000	1,000,000
Collaborative Urban Educator				895,000
State Bonding Funds for Magnet School Facilities	20,000,000*	-0-	-0-	22,200,000**
General Fund Grants				7,500,000***

*Funded by 1994 legislature. $10,000,000 was allocated to the East Metro Tri-District magnet program and $10,000,000 was also allocated to the West Metro Education Program. (WMEP)

**$22,200,000 was allocated by the 1998 legislature for the following purposes:
- $ 1,900,000 Downtown Minneapolis Magnet Facility
- $ 3,800,000 East Metro Magnet Facility
- $14,500,000 West Metro Education Program (WMEP) for Robbinsdale Facility
- $ 2,000,000 Southwest (WMEP) in Edina

***The 1998 legislature also provided $7,500,000 to be used as follows:
- $1,800,000 construction costs for Southwest WMEP @ Edina
- $ 700,000 construction costs for WMEP @ Robbinsdale
- $1,500,000 construction cost for WMEP @ Minneapolis Downtown Facility
- $3,500,000 Programming costs

[1] Includes general education revenue attributable to integration transportation in F.Y. 1997 and F.Y. 1998.

INTERDISTRICT INTEGRATION TRANSPORTATION GRANTS

Districts	F.Y. 1995 1994-95	F.Y. 1996 1995-96	F.Y. 1997 1996-97	Estimated F.Y. 1998 1997-98
Minneapolis	N/A	-0-	-0-	35,853
North St. Paul	N/A	-0-	30,024	82,350
Richfield	N/A	-0-	571	2,515
Roseville	N/A	8,201	43,073	67,002
St. Louis Park	N/A	7,858	121	-0-
St. Paul	N/A	56	90,887	171,722
Stillwater	N/A	-0-	-0-	4,699
TOTAL	**N/A**	**$ 16,115**	**$ 164,676**	**$ 364,141**

Notes:

1. The inter-district integration transportation grant programs started in F.Y. 1996. The program only provides grants for inter-district programs.

2. The integration transportation grants applications for F.Y. 1999 total approximately $700,000.

3. The State has funded this grant program at $970,000 for each of the fiscal years 2000 and 2001.

EXPENDITURES

Actual District Desegregation Expenditures are as reported by districts through the Uniform Financial, Accounting and Reporting System (UFARS) by using finance codes 315 and 715.

Districts are required to separate all desegregation revenues and expenditures.

Desegregation expenditures have been incurred by districts other than Minneapolis, St. Paul and Duluth. The following tables summarize the general fund and transportation fund expenditures since the 1994-95 (F.Y. 1995) school year.

SUMMARY OF GENERAL FUND EXPENDITURES USED FOR DESEGREGATION

General Fund (315)

	F.Y. 1995 School Year 1994-95	F.Y. 1996 School Year 1995-96	F.Y. 1997 School Year 1996-97	F.Y. 1998 School Year 1997-98 (unaudited)
Minneapolis	12,375,788	29,270,978	12,728,091	15,339,438
St. Paul	22,077,966	23,096,354	23,193,936	23,952,048
Duluth	2,545,177	2,802,549	2,670,319	2,844,829
N. St. Paul	-0-	-0-	-0-	
Richfield	-0-	-0-	-0-	
Roseville	41,408	113,918	1,480	
Sibley East	-0-	-0-	1,350	
Stillwater				
Total	**37,040,339**	**55,283,799**	**38,595,176**	**42,136,315**

SUMMARY OF TRANSPORTATION EXPENDITURES USED FOR DESEGREGATION

Transportation Fund (715)

	F.Y. 1995 School Year 1994-95	F.Y. 1996 School Year 1995-96	F.Y. 1997 School Year 1996-97	F.Y. 1998 School Year 1997-98 (unaudited)
Minneapolis	12,840,067	14,940,574	15,887,794	15,267,985
St. Paul	6,396,459	6,520,386	7,943,799	8,250,890
Duluth	345,547	309,104	191,130	205,256
N. St. Paul	-0-	-0-	35,132	Not Available
Richfield	-0-	605	3,444	2,515
Roseville	-0-	9,686	51,432	67,002
St. Louis Park	-0-	9,577	345	Not Available
Stillwater				4,699
Total	**19,582,073**	**21,789,932**	**24,113,076**	**23,798,347**

UFARS finance code 315 displays the general fund expenditures reported by school districts for desegregation purposes. UFARS finance code 715 displays the desegregation transportation expenditures reported by school districts associated with the districts integration plans. Due to the nature of the different district desegregation plans, the split between general fund and transportation expenditures differs considerably between Minneapolis and St. Paul. Except for 1995-96, Minneapolis spends about twice as much for desegregation transportation as St. Paul, and St. Paul spends considerably more in the general fund when compared to Minneapolis.

Because the proposed rule requires that affected school districts develop and promote incentives to increase voluntary desegregation, school district expenditures for desegregation activities may increase if new inter-district and intra-district desegregation options are developed and implemented.

II. IDENTIFICATION OF COST ESTIMATES ASSOCIATED WITH THE PROPOSED RULE.

This section follows the rule part numbers of the proposed rules and identifies provisions that may have a financial impact upon the local school district or the state agency.

A. 3535.0120 Duties of Districts

1. **Content:** Requires districts to submit enrollment data by racial composition of the school district on a school site by school site basis.

2. **School District Cost:** Districts are already collecting this data in MARSS and therefore, there should not be any significant cost changes for districts to report this data to the state.

3. **State Administration Cost:** None. This data is already being collected by the school districts for reporting through the MARSS system.

B. 3535.0130 (subparts 1 and 2) Duties of the Commissioner. (Review of data and District information).

1. **Content:** Requires review of racial composition data by the Commissioner within 60 days. If the 20% trigger is met, or if a complaint is received, this section also requires the Commissioner to gather additional information to determine whether racial composition of the school site is the

result of intentional discriminatory purpose. Commissioner may request additional information including:

- School attendance boundaries
- Assignment and transfer options for students
- Racial composition of school sites in the district
- Listing of curricular offerings and participation by race
- Listing of extracurricular offerings by site
- Assignment of teachers, by race and school
- Qualification/experience of teachers at sites compared with other sites
- Evidence of equitable financial resources at sites
- Comparison of facilities of sites to other sites
- Data to evaluate if busing is disproportionate

2. **School District Cost:** This is an administrative function of the Commissioner's office and, therefore, does not impact school districts. The reporting of the above listed items by the school districts is addressed in section D. It should be noted that only a very limited number of districts will be required to provide this additional information.

3. **State Administration Cost:** Some additional staffing costs will be incurred; however, these costs are included in the additional staffing estimates in section J.4., (page 28) of this document.

C. 3535.0130 subp. 3: Integrated Alternatives

1. **Content:** Requires districts to provide affirmative evidence that students in racially identifiable schools have options to attend integrated settings.

2. **School District Cost:** This provision may amount to just a reporting function if students do in fact have options. In such cases the district will simply report the information needed to give evidence. In other cases where not all students have been provided alternatives, districts may need to take additional actions to create alternatives and then provide evidence to the Commissioner. If districts need to provide additional transportation, there will be a significant fiscal impact. The cost per student transported will depend on a variety of factors, including the number of students participating, the size of the geographic area in which the students live, and the dispersion of the students within the attendance area.

3. **State Administration Cost:** Some additional staffing costs will be incurred; however, these costs are also included in section J.4.

D. 3535.0140 Response of Districts

1. **Content:** Requires districts to respond to the request for information within 60 days and to provide additional information, if required, within 30 days.

2. **School District Cost:** This data should be currently available to most school district administrators in most school districts. Much of the information requested under this section is comparable to data that districts are required to submit to the department under the current rule.

   In some districts, gathering all of the information requested may create a need for some added staff time. Discussions with the Minneapolis and St. Paul school districts revealed that some of the reporting requirements under this section will also require new data collection procedures. In these cases, the first year's probable cost for collection procedures is estimated at $2.00 per student and subsequent years data collection costs would be about $1.00 per student.

   Therefore, the "additional" costs per year would be estimated from $1.00 to $2.00 per student where the additional data is required. It should be noted, however, that this additional data will only be sought from a small number of school districts.

Lower Range Estimate	$100,000
Upper Range Estimate	$200,000

3. **State Administration Cost:** Some additional staffing costs will be incurred; however, these costs are included in section J.4.

E. 3535.0150 Development of Plan for Mandatory Desegregation Enforcement

1. **Content:** The proposed rule requires the department to monitor compliance, provide technical assistance in developing remedial plans if one is required and to continue to monitor the plans to remedy intentional segregation by the district.

2. **School District Cost:** District cost is only applicable if the Commissioner finds that a district has engaged in intentional segregation. It is anticipated that the finding of intentional segregation would be very rare, since in the past 25 years, no such findings have been made by the Commissioner. Therefore, the present assumption is that there would be no additional cost to districts.

3. **State Administration Cost:** Because it is anticipated that no districts will be found in violation of this section, it is expected that there will be no additional cost to the Department.

F. 3535.0160, subp. 1 Integration of Racially Identifiable Schools-Not the Result of Segregation (Notice to district of plan including voluntary measures)

1. **Content:** If the Commissioner determines that a racially identifiable school is not the result of segregation, the Commissioner will notify the district to develop a plan that provides incentives to help integrate racially identifiable schools. The plan is to be submitted to the Commissioner.

2. **School District Cost:** This is an administrative function of the Commissioner's office and has no cost impact to the school district.

3. **State Administrative Costs:** Some additional staffing costs will be incurred to review these plans, however, these costs are included in section J.4.

G. 3535.0160 subp. 2: Integration of Racially Identified Schools – Not the Result of Segregation (Community Collaboration Council)

1. **Content:** Requires districts to establish and use a community collaboration council to assist in developing the district plan.

2. **District School Costs:** It is assumed that the costs of establishing and operating a collaborative council are a part of the district's costs for developing and submitting a plan. It has been estimated that probable costs for this provision would be no more

than $5,000 per site. It is estimated that districts with multiple sites would consolidate their planning efforts and planning costs. It is also assumed that these costs will occur annually. Based on these estimates, the probable cost for the 11 racially identifiable sites in the five districts (excluding Minneapolis, Duluth and St. Paul) affected by the part of the proposed rules is $55,000.

However, for Minneapolis, St. Paul and Duluth, who are already receiving substantial desegregation funding from the state and doing similar functions, there should be no additional costs.

3. **State Administration Costs:** It is assumed that current department staff are sufficient to provide the assistance and technical support that school districts require to operate collaboration councils.

H. 3535.0160, subp. 3 Integration of Racially Identified Schools Not the Result of Segregation (District Plan)

1. **Content:** If racially identified schools analyzed under 3535.0130 are not the result of segregation, the district must develop a plan that describes integration efforts and submit it the Commissioner. The plan shall be written and adopted by the end of the academic year in which the district received notice or six months later, whichever is longer.

2. **School District Cost:** The proposed rule includes a list of options/incentives that a district or school site may choose to implement to improve integration.

The purpose of this section is to provide a range of estimated costs for implementation of each of the options given. However, providing any cost estimates requires that some data or information be known to reach a meaningful probable cost. Unfortunately, it is not possible to know what incentives will be chosen by a district or site. The options or incentives a school site may decide to implement will vary. Schools will probably implement a select number of incentives, rather than all that are listed.

As a result of the large number of variables and unknowns, the probable cost to any specific school district can not be estimated.

It should also be noted that Minneapolis, Duluth, and St. Paul already receive millions of dollars from the State each year to do precisely these types of activities. See charts on pages 7-9. Therefore, they may have no new costs, or minimal costs over and above the money they currently receive. Moreover, all other

districts who come under the provisions of this rule will be able to access desegregation funds under Minn. Stat. §124.315. That legislation will provide up to $93 per pupil for desegregation activities of districts required to provide a desegregation plan. Consequently, these districts, like the other three may not incur additional unfunded costs, if the $93 per pupil cover the integration activities they select.

It is recognized, however, that some general guidelines for probable cost are needed. Therefore, a range of costs is estimated for each of the options/incentives suggested.

The options as listed in 3535.0160 subp. 3 are listed as follows:

a. **Duplicating programs that have demonstrated success in improving student learning at schools that are racially identifiable.** Duplicating a successful program or curriculum from another school site or district could vary in cost. Minor curriculum revisions could be quite inexpensive, whereas, altering the curriculum of all subjects being taught would be more costly.

   Minor program or curriculum changes could be implemented for as little as $20 to $30 per pupil whereas a major revision in all curriculums – including some additional teacher training and new text books – would be more expensive. It is assumed that if the district requires a major curriculum change – it would be done within the normal curriculum cycle.

   If the district was to develop a magnet program with a separate facility, the costs would be significantly higher.

b. **Providing incentives to help balance racially identifiable schools, for example: providing incentives to low-income students to transfer to schools that are not racially identifiable, providing transportation, and by providing interdistrict opportunities and collaborative efforts with other districts.** It is assumed that this incentive basically involves the transportation of students on an intra-district or inter-district basis.

   This incentive is a potentially costly option. The Tri-District School program provides a good example of transportation costs to help implement integration. The following costs were incurred by North St. Paul, Roseville,

and St. Paul during the 1996-97 (F.Y. 1997) school year for students being transported within the inter-district desegregation programs.

	(F.Y.19 97) School Year 1996-97 Actual cost for Inter-district Programs	(F.Y. 1997) School Year 1996-97 Actual cost for Regular to and from Programs	Difference
N. St. Paul	$1,098.00	$182.00	$916.00
Roseville	789.00	272.00	517.00
St. Paul	559.00	172.00	387.00
Average	815.00	209.00	606.00

The cost of transporting students in the Tri-District inter-district program ran from a high of $1,098 per pupil to a low of $559 per pupil. The greater the population density – the lower the cost per pupil.

c. **Providing incentives to teachers to improve the distribution of teachers of all races at schools across the district.** Teaching assignments are normally administered in accordance with provisions as negotiated with each respective teacher's union or are administered in accordance with school district policy. If teacher assignments or transfers are handled within school policy, the policy is normally written in cooperation with the teacher union. Therefore, teacher assignments and transfers are not unilateral decisions of the school board and as a result any assignments and transfers desired by the school district that go beyond the provisions of the union contract or district policy will generally require union approval.

In order to request a teacher to transfer to another school site some type of incentive will need to be negotiated with the teacher union. This incentive would normally be financial.

For budgeting purposes, a school district could assume that such an incentive might range from 5% to 10% of a teacher's salary.

d. **Providing incentives to teachers . . . .including staff development opportunities.** The cost for providing

additional staff development opportunities will vary depending upon the district need for special training for teachers in racially identifiable schools. Districts currently have the authority to use existing funds for inservice training purposes; however, the additional staff development opportunity incentive as suggested within these proposed rules may require additional funding, in some cases.

It is not expected that members of WMEP will incur substantially new costs, because the Metro Staff Development Center presently receives money for staff development of this nature. Over the past five years, WMEP has received several hundred thousand dollars for this effort.

If this amount is reduced to an amount per pupil for the districts involved in WMEP, it amounts to about $2.50 per student. It seems reasonable to assume that initiating a specialized training program would cost more than $2.50 per pupil depending upon the size of the district or districts involved. Economics of size will affect per pupil costs. Subsequent years training costs would be less.

e. **Providing incentives to teachers . . . . including strategies for attracting and retaining staff who serve as role models; and strategies for attracting and retaining staff who have a record of success in teaching protected students.** There is an increasing shortage of teachers in Minnesota and the United States. Qualified teachers who have had success in teaching racially identified schools and who can also act as role models are and will be even more scarce than teachers without these specialized experience.

Again, it is difficult to estimate how much additional money this option would cost districts. Currently, districts can apply for up to $1,000,000 per year in grants for minority teacher incentives and teacher of color programs (see chart, p.8) In addition, $895,000 is appropriated in F.Y. 1998 and $500,000 is appropriated in F.Y. 1999 for state grants to collaborative urban educator programs that prepare and license people of color to teach.

However, if districts consider hiring bonuses, red-letter salary schedule rates or other significant ways to attract and retain staff, they may incur more costs. For example, red-

letter salary schedule rates may require 5% or 10% or more above the normal salary schedule. Therefore, the incentives may have a financial impact to school districts employing this incentive or strategy, if the authorized funds are expended.

f. **Greater promotion of programs provided at racially identifiable schools designed to attract a wide range of students.** It is difficult to estimate even a range of costs for this provision since there are so many different types of programs which might be used. Implementing a unique curriculum might be one strategy which may not be very costly. However, another way to implement this option could be establishing a whole new magnet school. The following are estimated costs provided by the St. Paul and Minneapolis school districts for developing magnet schools:

i. Average cost to Build and Open a Single Magnet School Site for 700 Middle School Students according to Minneapolis and St. Paul Staff:

Planning costs	$300,000*	$300,000*
New Construction**	$14,700,000 to	$17,700,000
Total:	**$15,000,000 to**	**$18,000,000**

*Planning costs listed are for a single district planning a new school. Minneapolis has estimated that the start up/planning costs for a desegregation magnet school in cooperation with its eight WMEP partner school districts will be approximately $1,000,000. In addition, the cost of acquisition of property for school sites has been increasing in recent years. Finding suitable real estate property to be used for construction of school facilities which the district can afford is becoming more difficult for districts such as Minneapolis and St. Paul. The costs for building a high school would be higher.***

**Includes equipment and furnishings but excludes land.

***Again, it should be noted that this may not be an additional cost to districts, if the State funds these

activities as it has in the past. All of the planning costs described under this paragraph for WMEP activities were funded by the State.

The 1998 legislature provided metropolitan school districts and the WMEP consortium, with $29.7 million for the planning and construction of magnet schools. See page 8 for additional information on State funded magnet school projects.

ii. Pupil Transportation Costs. Based upon the Tri-District magnet school transportation cost, the additional transportation costs associated with a magnet school varies from $916 per student in suburban North St. Paul to $387 per student in St. Paul. The cost for transportation is a function of population density. Refer to paragraph b of this section for additional information on pupil transportation.

iii. Building and Facility Maintenance. If a magnet school for integration purposes is built for a consortium of school districts, it is assumed that the State would provide funding for the initial construction including equipment. Presumably the districts involved would, however, have the responsibility to fund the annual operating costs to maintain the facilities.

For the purpose of estimating building and maintenance cost – it is assumed that the building is approximately 120,000 square feet and designed for a capacity of 700 middle school students.

It costs approximately $1.30 per square foot per year to heat, air condition and to provide custodial and maintenance supplies. This totals $156,000 or $223 per student per year.

Equipment repair/replacement, building repairs and other expenses formerly paid from the capital outlay fund is approximately $30 per student per year. This does not include major repairs such as replacing roofs.

Custodial staffing costs assume six (6) FTE staff

members including a head custodian. Salary and benefits for six custodians will approximate $240,000 or $343 per student per year.

Summary:

	Cost per student per year
Utilities and Supplies	$223
Equipment repairs/ Replacement and Builidng repairs	30
Custodial Labor Costs	343
TOTAL:	$ 596

iv. Additional Professional and Support Staff. When a magnet school is opened it is assumed that the teaching staff ratio will be similar to any other building and as a result, no additional classroom teachers are included within this cost estimate. A new building does require some additional administration, specialists and support staff as listed below.

- Principal
- Assistant Principal
- 3 FTE Office Staff
- 2 FTE Media and Technology
- 1 FTE Health Service Assistant
- 2 FTE Other Support Staff

Under this set of assumptions the salary and benefits would cost between $500 and $657 per student per year for professional and support staff.

The Minneapolis school district estimates that an additional annual cost of $1,000 to $1,500 per student per year is incurred when opening and operating a new magnet school building. This cost assumes that all of the students in the magnet school would otherwise be housed within an existing district facility. The Minneapolis estimate included the costs in paragraph iii for building and facility maintenance along with the additional professional and support staff reviewed in this paragraph.

It is assumed that as new magnet school facilities are built for desegregation purposes, school districts would make appropriate decisions to minimize the financial impact on their district. Under current funding formulas, funding follows the student to the school site and the individual school sites use these funds to provide services to the student.

v. **Provide smaller class sizes.** The cost for this provision depends on how much the class size is reduced. For example, if a school district of 1,000 students had an average class size of 25 students, the number of additional teaching staff required to lower the average class size to 20 students per class would be 10 additional teachers. Using a teacher salary and benefits of $35,000 (assumes salary of $28,000 and benefits of $7,000) the class size reduction for this district would cost about $350,000 annually or $350 per student. This estimate assumes hiring newer teachers at the lower end of the salary schedule.

It is not possible to determine which districts or sites will reduce class sizes and what the total cost impact of this provision would be at this time. In addition, in some districts classroom space might be limited. By reducing class sizes, some districts may not have enough classrooms to accommodate the new student classes. This may have an affect on school building construction, utilities, support staff required, and additional school administration. It should be noted, however, the average class size can also be reduced without adding classroom space by implementing a different delivery systems such as team teaching.

vi. **Increased counseling and support services.** The cost of this provision depends on how the district increases staff in these areas. A no-cost method would be to divert staff from other areas into these areas. If a district decided to add additional staff, the cost per each additional staff member would be approximately $55,000 for both salary and benefits. This estimate assumes hiring more experienced staff to fulfill the need for

counseling services.

vii. Increased extracurricular activities at racially identifiable schools. Based on F.Y. 1997 UFARS data, on a statewide basis, school districts spent on the average, $154.42 per student on extra/co-curricular activities and student athletics (The state total expenditure of $128,680,592 divided by the state total enrollment of 833,300). The average cost of $154.42 is an average for all students K-12. The cost for secondary students only would be higher. This amount excludes late-activity transportation costs that are associated with after school activities. The cost of getting students home from after school extra-curricular activities is dependent upon the distribution of students in the district(s) attending the school. Because of large distances and sparsity of students, transportation of students participating in after school activities can be costly. At this time, it is not possible to estimate the number of districts that will be increasing their extracurricular activities at racially identifiable schools and the associated costs.

viii. Promoting instruction about different cultures. The cost for this provision appears to be small. Some of the anticipated costs for staff development would help fulfill this option. Districts are already providing programs and instruction that promote cultural diversity as required by the Minn. Rules pt. 3500.0550.

ix. Conclusion. Implementation of these integration incentives have cost implications for school districts. The extent of the racial isolation at a site is a major factor in determining the cost of these incentives. Costs are driven by the amount of racial isolation and the alternatives chosen to address the condition. Total cost for these incentives cannot be determined before the affected school districts develop plans because of the unique characteristics of each district and individual school sites.

I. 3535.0160 subp. 4: Commissioner's Duties

1. **Content:** Requires the Commissioner to review and evaluate the plans developed and implemented and to report specified data to the legislature. This would require additional department staff time.

2. **State Administrative Costs:** Additional staff will be required to take responsibility for collecting, analyzing, and reviewing the community collaboration council plans and analyzing data and writing reports to the legislature. (3535.0160, subp. 4) The estimates for this are included in Section J.4.

This subpart also allows the Commissioner to recommend financial incentives to compensate with rewards to districts for programs that are successful. Because the amount of financial rewards is discretionary and subject to legislative approval, no cost is given for this provision of the rules.

J. 3535.0170: Integration of Racially Isolated School Districts

1. **Evaluation 3535.0170 (subp. 1):** Commissioner determines which districts are racially isolated and notifies the districts and the adjoining (contiguous) school districts.

Based on 1996-97 school year data, the following school districts would be considered racially isolated at 20% under the proposed rules:

Minneapolis
St. Paul
Brooklyn Center
Worthington
Mountain Lake
Madelia
Butterfield

The number of adjoining districts affected is 26.

2. **Multidistrict Collaborative Council 3535.0170 (subps. 2,3,4, and 5):** These subparts require the establishment and operation of multi-district collaboration councils to develop integration plans. Councils must identify interdistrict integration issues and develop actions designed to address those issues. The committee must write and adopt a plan and submit it's recommendations to the affected districts.

The following costs are estimated to be the same each year. Costs to

Minneapolis and St. Paul School Districts are not given because of the fact that they are already members of such councils; as such they will have no new costs. It is assumed that the other racially isolated districts will have administration/planning expenditures for this section of the rule. The costs include travel, printing of materials and monthly meeting costs.

The cost is estimated at $2,000 to $15,000 per school district depending upon district factors. Based on this assumption, the cost ranges are estimated to be:

5 Isolated Districts = (excluding Minneapolis and St. Paul)	$10,000 to $ 75,000

Assuming the racially isolated districts have to develop plans with adjoining districts, and assuming adjoining districts are working with each racially isolated district, the planning costs for adjoining districts are estimated to be $1,000 to $7,000 per district depending upon district factors. Based on this assumption, the cost ranges are estimated to be:

16 Adjoining Districts (excluding districts adjoining Minneapolis and St. Paul)	$16,000 to $114,000

Total estimated annual planning costs for racially isolated school districts and adjoining school districts:

Lower Range Estimate	$ 26,000
Upper Range Estimate	$189,000

Summary.

It is assumed that this initial multi-district collaboration will occur over a two-year period of time during the school years 1999-2000 to 2000-2001 (F.Y. 2000 and 2001).

It is anticipated that any additional administrative costs for running councils, printing and the like will be absorbed in the amounts above.

3. District Plan. 3535.1070, (subp. 6) (Racially Isolated School Districts) After receiving input from the councils, districts must submit to the commissioner a plan for implementation in the next school year. The plan may include, but is not limited to options and incentives such as:

- Cooperative transportation

- Incentives for low-income students to transfer
- Development of cooperative magnet programs to increase racial balance
- Other cooperative programs
- Cooperative efforts to recruit staff of color
- Shared extracurricular opportunities, community education.

The following is an estimate of probable costs associated with implementing each of the options described in 3535.0170, subp. 6. (District Plan). School districts may choose among these options and may do one or only a few; it is not likely that all would be implemented.

a. **Providing cooperative transportation that helps balance a racially isolated district.** Estimating the cost of transportation services for inter-district desegregation or integration programs can not be done until school districts make choices and submit their collaboration plans. Some factors affecting cost include the number, ages and home addresses of the students participating in the programs, and the location of the programs.

If only a small number of students from each district participate, bus route efficiency may be a problem. The students' home addresses may be scattered throughout the districts making the routes lengthy and expensive. Program locations may be scattered throughout the districts as well.

Currently, the only school bus transportation service being provided for interdistrict desegregation or integration programs occurs in the Roseville, North St. Paul-Maplewood and St. Paul school districts. The Tri-District School opened in September of 1996. The transportation costs per student for North St. Paul-Maplewood was $916 more per student than the cost for to-and-from school transportation services within the districts. The costs are high because of the small number of students participating from that district and the large attendance areas the school bus routes must cover. St. Paul's desegregation transportation cost per student exceeds regular cost per student transported by $387 per student. St. Paul has a much larger participation rate than Roseville and North St. Paul-Maplewood and this helps reduce costs. It can be assumed that costs for other districts providing transportation to inter-district integration programs will be similar to the costs experienced by Roseville, North St. Paul-Maplewood and St. Paul.

The 1995 Legislature provided funding for inter-district integration transportation starting with 1995-96 (F.Y. 1996). The funding has

increased from only $16,115 in 1995-96 (F.Y. 1996) to an estimated $364,141 for 1997-98 (F.Y. 1998). Applications for the 1998-99 (F.Y. 1999) school year are anticipated to be around $700,000. The Legislature has funded the inter-district integration transportation program at $970,000 for each of the school years 1999-00 (F.Y. 2000) and 2000-01 (F.Y. 2001).

Inter-district integration transportation funding was changed for 1998-99 (F.Y. 1999) and combined with the desegregation program funding formula as provided in Minn. Stat. §124.315.

Minneapolis estimates that inter-district transportation costs per pupil transported at an additional $1,180 annually for magnet school programs. It should be noted the additional costs per student for transporting students to an intra-district magnet school was $205 for the 1996-1997 school year.

b. **Providing incentives for low-income students to transfer to districts not racially isolated.** The additional transportation costs that district may incur in the transportation of low-income students is estimated to be the same as indicated in a. above.

c. **Development of cooperative magnet program or schools designed to increase racial balance.** Development of multi-district magnet programs are estimated to be at least $400,000 per building for planning, curriculum development, equipment, and staff training. Based on Minneapolis' experience in development of metro-desegregation magnet schools, the total cost for 3-year planning and start-up of a new multi-district magnet school could be $800,000 to $1,000,000. This cost is reflective of experience in Minneapolis and St. Paul. Each magnet school site needs a coordinator, curriculum development, and equipment and supplies. Additional costs could be incurred depending upon the number of magnet disciplines per site, equipment required, numbers of students per site, and facility space requirements.

A recent cost estimate from the Minneapolis school district shows the total cost for developing four new interdistrict magnet schools between 1998 and 2002 is $78.3 million. Minneapolis, along with its eight WMEP partner districts, opened a downtown magnet program and a new building is currently under construction. Plans are being developed for a magnet in the southwest suburbs as well. An additional magnet in Robbinsdale is currently being built. St. Paul estimates the cost of developing magnet schools to be $15.0 to $18.0 million per site, excluding land cost. A critical component of magnet schools is student transportation. Again,

because of the wide distribution of the students in the district(s), transportation costs can be significant.

d. **Cooperative programs designed to enhance the experience of students of all races and from all backgrounds and origins.** Duplicating a successful program or curriculum from another site or district could vary significantly in cost. Minor curriculum revision could be quite inexpensive, whereas, altering the curriculum of all subjects being taught could be very costly. Revising teaching methodologies could also be a part of the curriculum revisions.

   Minor program or curriculum changes could be implemented for as little as $20 to $30 per pupil whereas a major revision of all curriculum including some additional teacher inservice training and new textbooks – could cost as much as $100 to $200 per pupil.

e. **Cooperative efforts to recruit staff of color...teacher exchanges and staff development.** The Teachers of Color Program (Minn. Stat. §125.623) provides additional funding to school districts to recruit persons of color who are interested in pursuing a teaching degree. All districts are notified of this program. If districts make additional efforts to recruit, more funds could be required for this program. Minneapolis estimates the $200,000 per year is required for recruiting 30 teachers per year. The cost estimate includes travel, lodging and related expenses incurred in recruiting teachers of color on a state and national level. Some of these costs are currently funded through the various Integration Programs grant. In addition, programs such as the Collaborative Urban Educator (CUE) provide additional funding to prepare and license people of color to teach. The Minneapolis district would like to expand recruitment activity from 30 teachers to 80-100 teachers per year.

f. **Shared extracurricular opportunities and community education.** Development, marketing and staffing of additional extracurricular opportunities are estimated to be $10,000 per district per year. Extracurricular activities could include such activities such as academic clubs, community education activities. Depending on the level of programs and participation, the cost per district could vary considerably.

4. **Cost to the Department.** The Department of Children, Families & Learning will need additional staff to review data, evaluate plans and to make recommendations to the Commissioner for racially isolated school districts and to analyze data received and prepare reports received.

There are 26 adjoining school districts in the state affected by inter-district planning requirements and 7 racially isolated districts. The department estimates that 2 FTE Educational Specialists and 2 FTE clerical support people will be needed to fulfill these requirements and the requirements necessitating additional departmental staff identified throughout this report for the Commissioner to review data, analyze plans, and prepare reports. The estimated costs for these staffing positions and additional operating costs are as follows:

2 FTE Educational Specialists @ $75,000 each	$150,000
1 FTE Clerical Support Person @ $32,500 each	65,000
General Operating Costs	13,000
Total	**$228,000**

K. 3535.0180 Evaluation of Collaborative Efforts

1. **Content:** Requires that the Commissioner biennially evaluate the result of collaborative efforts under 3535.0170 to determine if there has been successful implementation of the plan and report to the House and Senate Education Committees. This subpart requires the Commissioner report the results to the legislature and allows recommendations.

   Staffing costs for this are included in the section above.

L. 3535.0180 Application to a District with an Existing Plan

A school district with an approved desegregation plan in place on the effective data of parts 3535.0100 to 3535.0180 must prepare a voluntary plan under parts 3535.0100 to 3535.0180 for all sites previously covered by a desegregation plan.

This provision would result in the Duluth School District being required to submit a district plan under the proposed rules. Duluth receives integration funding; therefore, there should be no additional costs.

SUMMARY OF COSTS

This summary of costs involves the following sets of assumptions:

1. Assumes adoption of the proposed rules 3535.0100 to 3535.0180 during the 1998-99 school year (F.Y. 1999).

2. Assumes that the obtaining of data/information from districts and the review process by the Commissioner will occur during the 1999-2000 school year (F.Y.2000).

3. Assumes that the community councils involvement, school board's planning and Commissioner's review/approval of plans will occur during the 2000-2001 school year (F.Y. 2001).

4. Assumes that school district's approval plans will be implemented during the 2001-2002 school year (F.Y. 2002).

5. Cost analysis for purposes of the statement of need and reasonableness is limited to identifiable costs for F.Y. 2000 and F.Y. 2001.

6. Assumes the current plans for developing magnet schools and/or cooperative programs within the East Metro Tri-District and the West Metro Educational Program consortiums are not included in this cost analysis.

The cost summary always assumes "additional" costs for implementing proposed rules 3535.0100 to 3535.0180. It does not include any costs for implementing existing programs under the current rule.

Cost Summary

Section of Rule Description	F.Y. 2000 1999-2000 School Year			F.Y. 2001 2000– 2001 School Year			Biennial Total		
	Agency Cost	District Cost	Total	Agency Cost	District Cost	Total	Total Agency Cost	Total District Cost	Total Cost
3535.0140									
Lower Range Estimate		100,000	100,000		100,000	100,000		200,000	200,000
Upper Range Estimate		200,000	200,000		200,000	200,000		400,000	400,000
3535.0160, Subp. 2		55,000	55,000		55,000	55,000		110,000	110,000
3535.0170									
Subp. 2,3,4 and 5		26,000	26,000		26,000	26,000		52,000	52,000
Lower Range Estimate		189,000	189,000		189,000	189,000		378,000	378,000
Upper Range Estimate									
3535.0170,Subp. 4	228,000		228,000	228,000		228,000	456,000		456,000
Totals									
Lower Range Estimate	228,000	181,000	409,000	228,000	181,000	409,000	456,000	362,000	818,000
Upper Range Estimate	228,000	444,000	672,000	228,000	444,000	672,000	456,000	888,000	1,344,000

Footnotes:

1. The SONAR provides cost estimates for the various exemplified "incentives" given as options in the rule. It is assumed that district plans will be implemented in the 2000-2002 school year once thereafter. Therefore, since the cost analysis is only for the first two years of the rules, these options costs are excluded from the analysis.

CONCLUSION:

IMPACT ON EDUCATION AIDS BUDGET

As described on pages 7,8 and 9 of this report, there are state aids and grants and local levies that currently support the desegregation/integration efforts of school districts. The number of districts eligible for funding and the cost of these programs will increase when this rule is implemented.

Integration revenue under Minn. Stat. §124.315 is currently limited to the Minneapolis, St. Paul and Duluth school districts. Because each district receives a fixed amount per pupil unit, these districts will not receive additional revenue when this rule is implemented. Other districts that are required to implement a plan according to the requirements of Minnesota Rules, parts 3535.0200 to 3535.2200, are eligible for revenue equal to the lesser of the actual cost of implementing the plan during the fiscal year or $93 per pupil unit. Assuming that this provision applies to districts required to implement a plan under the new rule (the statute refers to the old rule, which has been repealed), these districts will qualify for additional state aid and levy revenue beginning in fiscal year 2001, the first year of implementation. Based on the planning costs identified earlier in this report, the additional revenue for F.Y. 2001 is estimated to fall between $100,000 and $500,000. Beginning in F.Y. 2001, the state share increases to 78 percent of the revenue. This does not include implementation costs, such as the added cost of operating magnet schools, which would qualify for funding. Seventy-eight percent of the integration revenue will be funded with state aid, and the districts will be permitted to levy for the remaining 22 percent. Implementation of the new rule will also increase the amount needed to fund the integration transportation grants.

APPENDIX B

I. 1995 ROUNDTABLE DRAFT: POLICY. (3535.0200)

The State Board of Education (hereinafter referred to as "the State Board") reaffirms the holding of the United States Supreme Court in Brown v. Board of Education that racially segregated schools are inherently unequal. Racial segregation in schools prevents equal educational opportunity and leads to segregation in the broader society. In addition to its obligations to ensure desegregated/integrated schools in Minnesota, the State Board in 1983, assumed the legal responsibility to eliminate racial segregation in the Minneapolis Special School District No. 1. In reliance upon the State Board's action, the federal district court dissolved its supervision of the Minneapolis Public School's desegregation plan. Booker v. Special School District No. 1, No. 4071 Civ. 382 4 (D. Minn. 1983) (memorandum order June 8, 1983). Since that time, housing and migration patterns in the state's metropolitan areas have rendered effective desegregation impossible within the boundaries of individual school districts. The State Board thus recognizes and declares that the responsibility to desegregate schools within each of the state's metropolitan areas is shared by the State Board and all school districts in each metropolitan area.

REASON THIS LANGUAGE WAS NOT ADOPTED:

The language above was replaced with the current purpose section because several provisions of this paragraph are not accurate. As indicated in Section III, and Section V, B. (rationale for "definition of racial balance,") Brown v. Board of Education did not stand for the proposition that racially segregated schools, without more, are inherently unequal. Furthermore, the federal district court in the Booker decision did not release the Minneapolis School District from federal court supervision solely in reliance on the State's desegregation monitoring efforts, as the draft policy statement implies. See Ex. 41. Instead, the judge indicated that he was releasing MSD from court order for several reasons, including the changed composition of the school board and the district's proposed five year plan to bring greater racial balance. While the court noted that the Department of Education "should and will monitor the implementation of the long-range plan," the court did not envision that the State would assume the court's previous supervisory role over the district. Instead, Judge Larson stated "The Court finds and believes that the District should have the opportunity for autonomous compliance with constitutional standards." See Ex. 41. Finally, nowhere in that order does the judge suggest that the State has a duty to order mandatory desegregation efforts on a metro-wide basis, absent a finding of intentional discriminatory conduct; clearly, such a remedy would have been beyond the power of the district court even in 1983. See Milliken v. Bradley, 418 U.S. 717, 94 S. Ct. 3112 (1974). Nevertheless, the policy language of the Roundtable draft erroneously suggests that the court conferred such power upon the State.

Finally, the language above strongly implies that the Board (and now the Commissioner) have both a moral and legal duty to require inter-district racial balance. While a policy statement may express the view that the State has a moral responsibility to desegregate schools across district lines, the legal authority to require such a remedy is highly questionable, absent express legislative authority for such rules and absent a finding of intentional discriminatory conduct. See Section V.H., rationale for "Integration of Racially Isolated School Districts;" see also Milliken v. Bradley, supra.

ROUNDTABLE DRAFT POLICY – (I. – CONTINUED)

To further these principles set forth in Brown v. Board, it is the policy of the State Board to ensure access to opportunities or settings that result in equal educational achievement for diverse groups of learners educated in Minnesota. It is the policy of the State Board to prevent the concentration of racial and socioeconomic segregation in the schools and to ensure that school districts shall participate in a fair measure to help prevent racial and socioeconomic segregation.

REASON THIS LANGUAGE WAS NOT ADOPTED:

This language suggests that with racial balance and equal access to educational opportunities, students should and will have equal educational outcomes. This is not consistent with legal precedent or supported by sociological data.

Many courts have recognized that a myriad of factors, outside the control of school districts, affect outcomes; as a result, no other state has adopted a constitutional duty to assure certain educational outcomes. See, e.g., Olsen v. State, 554 P.2d 126, 148 (Or. 1976) (holding education clause was complied with if this state requires and provides for a minimum of educational opportunities" in school districts, cited in Skeen v. State, 505 N. W. 2d 299, 310 (Minn. 1993); Davis v. Grover, 480 N.W.2d 460, 474 (Wis. 1992) (recognizing that the education clause "does not require the legislature to ensure that all of the children in Wisconsin receive a free uniform basic education" but rather "to provide the opportunity" for them to receive such education.)

Sociological data also suggests that it is unreasonable to establish a standard which guarantees students equal educational achievement. As long ago as 1973, James Coleman stated:

> the idea of equality of educational opportunity is probably a mischievous concept in the sense that it misleads us to believe that we can attain it. No one has ever seen schools capable of creating equality, given differences in students' social background. The outcomes are going to be unequal even if the schools are strongly and equally effective.

An Interview with James S. Coleman, entitled Equality and Inequality, New York University Education Quarterly, v. 4 (Summer 1973) at 3. The testimony of James Guthrie,[1] who testified as an expert on school finance in the Skeen case, is also instructive about the reasonableness of a policy that requires equal educational outcomes. Guthrie was asked about the "minimum

[1] James Guthrie's credentials are detailed in Ex. 27.

attainment" definition of equal education opportunity, which is similar to that proposed in the Roundtable policy. In such a definition, resources are allocated to every student until they reach some specified level of attainment. Guthrie testified that "no state has tried to implement this definition." This is in part due to the great difficulty in "gaining agreement on the attainment level." Similarly, the Roundtable policy (and likewise the Roundtable's proposed definition of "equal educational opportunity in 3535.0300 subp. 2, discussed below) do not establish the level of outcomes that must be obtained. Guthrie noted that even if a agreement could be reached on the type of outcomes which had to be satisfied, "then it assumes some kind of technical precision or knowledge about what it would take to get Johnny up to that minimum level, and we don't have that kind of science in education, at least not yet, and probably not in the foreseeable future." See Ex. 27 (excerpts of Guthrie testimony).

Arthur Wise, also an expert in school finance as education policy, has indicated "it would be well to recognize two limitations on the attainment of equality – one theoretical and one practical. Theoretically, current knowledge of the instructional process is sketchy." Arthur Wise, Rich Schools Poor Schools: The Promise of Equal Educational Opportunity, pg. 143 (1968). Mr. Wise then quotes another author as follows:

> No one really knows what types of instructional methods best fit the needs of given groups of children. When one gets down to it, the process of tuition is based more largely on tradition, or the "wisdom of the ages," and on hunch and expediency than it is on scientific understanding of how people respond to different instructional processes. So there is no soundly based answer to the question, say, of how instruction of a group of culturally deprived children should differ from the middle-class-oriented set of practices that is standard in our land. Consequently, the theoretically attainable degree of equality of provision is a function of the state of knowledge of learning processes. The latter is subject to increase through educational research, but educational research itself does not ordinarily yield quick results.

Id. at 143 (citing Charles S. Benson, The Cheerful Prospect: A Statement on the Future of Public Education 6-67 (1965)).

Wise continues to cite the Benson book for a second limitation on the achievement of equal educational outcomes. Wise notes:

> "[t]he practical limitation is that for any group of children in an area who are of approximately equal age and ability, there is presumably one teacher who is best qualified to instruct them, but not all of the children can receive instruction from him on account of the limitations of size of school classes. Similarly, for any child, there is presumably one best group of children he might have for his classmates (children, of course, learn from each other as well as from the teacher,) but it would be a matter of purest chance if it could be arranged that he attend school with just that group of classmates.

Id. at 144 (citing Benson, The Cheerful Prospect at 66-67).

Simply put, " '[n]o school policy and no court order can assure any particular level of success in public schools any more than in any other aspect of life.'" Keyes v. Congress of Hispanic Educators, 902 F. Supp. 1274, 1282 (D. Colo. 1995) (quoting Keyes v School Dist. No. 1, 609 F. Supp. 1491, 1498 (D.Colo. 1985)), aff'd, 895 F. 2d 659 (10th Cir. 1990), cert. denied. 498 U.S. 1082 (1991). To establish a policy (and later, a definitional section) that requires schools in this state to ensure that all students equally reach some undefined level of achievement, in spite of the effects of family life, teaching, socialization and the many other factors outside the State's control that influence academic achievement, is simply not reasonable.

Finally, the policy language also suggests that the State Board (and now the Commissioner) has the authority to "prevent the concentration of socioeconomic segregation" in schools. The statute authorizing the desegregation rule does not give the Board or the Commissioner explicit authority to address socioeconomic concentrations of students of color. Moreover, the enabling legislation concerns itself with traditionally racial issues, including desegregation and racial balance. Therefore, it is difficult to even imply authority for the broad reach of this policy language.

Additionally, the Board at one time was considering including socio-economic status in the rule provisions. However, members of the NAACP specifically asked that such provisions be omitted, and that the focus instead be on racial isolation. Thus, affected stakeholders have objected to inclusion of such language. Finally, inclusion of such provisions were thought to raise data privacy issues, for while the districts have access to such information, there was concern that it could not be shared with the State.

It should be noted, however, that districts themselves are not precluded from using socio-economic status as a means of ensuring diversity. (See discussion in Section V.G.1.). It is not necessary for the State, via a rule, to mandate the elimination of socio-economic isolation in order for districts to implement measures designed to address those conditions. For all of these reasons, the language was omitted from the rule as now proposed.

ROUNDTABLE DRAFT POLICY – (CONTINUED)

Since education is the responsibility of the State, desegregation/integration is not the responsibility of a single district, rather a broader sharing of responsibility between and among districts and between districts and the State. Thus, the State Board recognizes the need for inter-district efforts to promote Desegregation/Integration.

REASON THIS LANGUAGE WAS NOT ADOPTED:

Certainly, the Board and now the Commissioner recognize the need for desegregation efforts to promote inter-district desegregation and integration; that is why the rule being proposed requires identification of racially isolated districts and monitoring of voluntary plans to improve racial balance across district lines. However, the first sentence of the paragraph quoted above implies not only a moral duty to desegregate, but also a legal duty. It is not accurate or even logical to suggest that because education is the legal responsibility of the State, that cross-district desegregation efforts are also legal responsibilities of the State and school districts. Indeed, for 24 years the Supreme Court has clearly held that school districts and states are not

legally liable for cross-district integration efforts absent a finding of a cross-district violation. See Milliken v. Bradley, 418 U.S. 717, 94 S. Ct. 3112 (1974). No Minnesota state court has held otherwise. See e.g., State v. Perry, 561 N.W.2d 889 (Minn. 1997) (no requirement to remedy disproportionate under-representation of blacks on grand jury absent a finding of intentional and systematic exclusion of blacks). Thus, this policy statement could create a new legal duty with attendant liabilities. There is serious reason to question the need for this action, particularly given the lack of explicit authority and the contrary legal precedent.

ROUNDTABLE DRAFT POLICY – (I. – CONTINUED)

Desegregation/Integration efforts should be shared by all learners and not borne only by learners of color. Equitable treatment of all learners should occur in an atmosphere free of discrimination so all learners attend school in a positive learning environment.

REASON THIS LANGUAGE WAS NOT ADOPTED:

Both notions in the above language have been re-incorporated into the proposed rule; they are also covered by existing statute. The first sentence is specifically adopted in the rule as now proposed as one measure of whether schools are engaged in intentional discriminatory conduct. See part 3535.0130, subp. 1.D. of the proposed rule. Part 3535.0130, subp. 2, which requires the Commissioner to determine whether educational inputs are equitable, addresses whether such inputs are being provided on a non-discriminatory basis. This incorporates the notion of equitable treatment of learners. Finally, Minn. Stat. § 363.03 subd. 5 (1996) enables the Commissioner of Human Rights to investigate whether students are being discriminated against in the school environment; therefore, it was not necessary to include this language here, particularly since there is nothing in the rule which would have considered how to measure whether the educational environment is "free of discrimination."

ROUNDTABLE DRAFT POLICY – (I. – CONTINUED)

The State Board recognizes that school integration takes place when effective interactions between diverse groups of people where common trust, respect, and honor are acknowledged by all.

An integral part of local district Community Learning and Desegregation/Integration Plan must be staff development for teachers and staff as well as the districts' efforts to recruit staff of color for each school site.

REASON THIS LANGUAGE WAS NOT ADOPTED:

Staff development is addressed in the Inclusive Education Program Rules, which are being revised. This is a more reasonable and logical place to address the issue.

ROUNDTABLE DRAFT POLICY – (I. – CONTINUED)

The State Board is committed to the involvement of site councils and community and parental involvement in the development, implementation and evaluation of a Community Learning and Desegregation/Integration Plan.

SUBSEQUENT HISTORY OF THIS LANGUAGE

Community councils have been retained in the proposed rule (see 3535.1060, subp. 2 and 3535.0170, subp. 3); therefore, it is not necessary to reiterate the policy commitment to such councils in the policy statement.

ROUNDTABLE DRAFT POLICY – (I. – CONTINUED)

The State Board recognizes the unique political status of enrolled American Indian learners. Neither the State Board nor school districts may adopt policies or practices which would have the effect of undermining federal Indian education statutes and programs.

REASON THIS LANGUAGE WAS NOT ADOPTED:

The first sentence of this paragraph was retained as it applies to American Indian students who are enrolled in a tribe. See 3535.0110 subp. 2. The other issues have been fully addressed. See Section V.G.2.

ROUNDTABLE DRAFT POLICY – (I. – CONTINUED)

The State Board recognizes that long term success in school desegregation is influenced by policies and practices of other governmental authorities. The State Board and local school districts will seek ways to collaborate with other authorities regarding housing, jobs, planning, and transportation that promote desegregation/integration.

REASON THIS LANGUAGE WAS NOT ADOPTED:

The first sentence of this draft has been reincorporated into the proposed purpose section. The second sentence has been omitted. While it is a legitimate goal of the State Board to work collaboratively with other governmental agencies, there is no way to determine whether school districts are complying with the goal in the context of this rule; furthermore, this sentence is more an aspirational goal than it is rule language. Therefore, the State Board and the Commissioner will continue to pursue initiatives related to this policy goal in other forums.

ROUNDTABLE DRAFT POLICY – (I. – CONTINUED)

The following rules are promulgated pursuant to the Board's legal duty to assure effective desegregation in Minnesota's public schools.

REASON THIS LANGUAGE WAS NOT ADOPTED:

Neither the State Board nor the Commissioner has a legal duty to assure effective desegregation in Minnesota's public schools. Further, including this type of language in a rule

would arguably create such a duty, which might also subject the State to unmeasurable liability for failing to eradicate the presence of all racial imbalance. Therefore, the language was omitted.

II. ROUNDTABLE DRAFT: DEFINITIONS (3535.0300)

A. Equal Educational Opportunity (Subpart 2)

Equal educational opportunity is fair and equitable access to programs and resources that support equal educational achievement including the provisions of 3500.0550 "Educational Diversity Rule."

Equal educational achievement results when equitable progress is being achieved across racially and economically diverse groups of learners. The results and progress are documented measurable growth criteria towards goals in their district Community Learning and Desegregation/Integration Plan.

REASON THIS LANGUAGE WAS NOT ADOPTED:

The first sentence of this definition has been incorporated into the proposed rule. As indicated in Section V.D.2.b., it is reasonable to measure equal educational opportunities in a way that ensures such opportunities are not denied or diminished based on race. However, all provisions of the Roundtable draft referring to achievement, such as those in the second paragraph of this definition, were omitted from the desegregation rule now being proposed.

Since the Brown decision, jurists, educators and social scientists have debated whether academic achievement is improved by desegregation generally and even more specifically by attaining a specific racial balance. The language considered in the Roundtable drafts implicitly and explicitly assumed the existence of such a correlation.[2] However, sociological studies, recent court opinions and even local anecdotal experience amply demonstrates that conditioning the effectiveness of a desegregation plan upon some measure of academic improvement is not needed, nor is it reasonable.

1. Current Sociological Data Indicates Little, If Any, Correlation Between Desegregation Efforts Aimed at Achieving A Particular Degree of Racial Balance and Improved Academic Achievement Of Students.

Research and writing about the claimed correlation between desegregation and improved academic achievement has been extensive over the last 20-30 years. While many societal benefits of desegregation have been studied by sociologists, (see discussion supra in Section V.A.), there is not a consensus among sociologists about the correlation between improved academic achievement and desegregation efforts; a more accurate summary of the research is that a positive correlation does not exist overall.

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[2] For a comprehensive analysis of the legal and sociological history of this thesis, see David Armor, Forced Justice, supra, at 59-116.

As long ago as 1978, a strong advocate of busing conceded that the positive educational effects of desegregation are illusive, at best. "Though it is possible to state with some confidence that desegregation does not hurt students . . .it is not possible to describe the positive educational effects accurately. This is true for several reasons." Gary Orfield, Must We Bus? Segregated Schools and National Policy, at 125 (1978) (emphasis added).[3]

Sociologist James S. Coleman came to the same conclusion. Coleman was one of the first prominent sociologists to assert a connection between desegregation and increased achievement among African-American students. The theory grew out of a study conducted by the U.S. Office of Education to survey the "lack of availability of equal educational opportunities for individuals by reason of race" in public schools throughout the country. The research was conducted by a team of social scientists led by Coleman and resulted in the report "Equality of Educational Opportunity," also known as the "Coleman Report." The report concluded that lower-class black children in majority middle-class white schools achieved better on standardized tests than did their counterparts in all-black schools. It also showed that there was little decrement in white achievement in integrated schools. Coleman and others argued that this meant integration would bring about achievement benefits. Id. at 65-66; James S. Coleman, New Incentives for Desegregation, supra, at 12.

However, Coleman's later research caused him to reject the unqualified connection between desegregation and improved academic performance. He later wrote:

> [A] review of a large number of analysis of the effects of desegregation on achievement have [sic] recently been completed, showing no overall gains in achievement. In some cases there seem to be slight gains; in others no significant effects; in still others, slight losses in achievement. Some of the most carefully-studied cases over a period of years following desegregation, such as Pasadena and Riverside, California, show either no achievement effects or else losses. Thus, what once appeared to be fact is now known to be fiction. It turns out that school desegregation, as it has been carried out in American schools, does not generally bring achievement benefits to disadvantaged children. (It is probably true that desegregation under optimal conditions will increase achievement of disadvantaged children. But that is not the point; there are many changes, under optimal conditions, that will have this effect. What we must look for is the effect that occurs under the variety of actual conditions in which desegregation is carried out.)
>
> The implication of this lack of generally beneficial effect on achievement is that no longer should we look solely, or even primarily, to racial balance in the

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[3] Fifteen years ago, Mr. Orfield, as part of a court-ordered remedy, helped design a desegregation plan with learning gap reduction goals much like the proposed Roundtable draft. Mr. Orfield later advised the court that the plan had seriously failed to produce the desired achievement results. See Ex. 42, Gary Orfield, "Desegregation and Educational Change in San Francisco: Findings and Recommendations on Consent Decree Implementation," submitted to Judge William Orrick, U.S. District Court, San Francisco, California, July 1992.

> schools as the solution to inequality of educational opportunity. That inequality of opportunity is not something that will be overcome easily. If we are looking for policies to help bring about equality of educational opportunity, it is necessary to take a broader look. And if we are looking for reasons to implement policies of racial balance in the schools, we must look further.

Id. at 12 (emphasis added).

In his recent text entitled Forced Justice, Desegregation and the Law (1995), Dr. David Armor discusses the sociological evidence surrounding the hypothesis that desegregation improves academic performance of students and, in particular, students of color. Dr. Armor begins his discussion about the hypothesis this way:

> In spite of voluminous research and writing on this topic, there is still no definitive study of the relationship between school desegregation and academic achievement, and no group of studies has generated consensus among social scientists who have conducted reviews of the research literature.
>
> Perhaps the best illustration of the elusive consensus on this issue is a 1984 review of desegregation and black achievement sponsored by the National Institute of Education (NIE) (footnote omitted). A panel of experts named by NIE developed a common methodology and selected a set of the most rigorous studies of desegregation and black achievement. Half of the panelists decided not to use the selected set at all, preferring other selections instead or preferring to compare desegregation to other educational interventions. Of the panelists who used the selected set, each applied other methodological criteria and eliminated additional students, so that all panelists ended up analyzing different groups of studies. Not surprisingly, each panelist came to different conclusions about the effects of desegregation on achievement.

Id. at 76.

Dr. Armor also notes that in studies purporting to draw a correlation between improved academic achievement and desegregation, often other conditions must be satisfied before a connection can be made between desegregation and improved academic performance. Id. at 70-76. In some cases, these conditions are under the control of the local school board; others are completely beyond a board's control. Id. at 74. Indeed, there is no consensus on what those conditions are even likely to be. Id. at 73. Given the lack of sociological consensus on whether there is even a correlation; given the lack of consensus over the types of conditions which must be present before a correlation can be drawn and given the lack of a local board's control over some of the important conditions, Armor concludes as follows: "Enhanced academic achievement is probably the last reason why any agency or individual should endorse desegregation policies." Id. at 113 (emphasis added).

A bibliography outlining the major studies on this question is attached as Bibliography 3. It amply demonstrates the lack of consensus on this question.

2. Recent Supreme Court Analysis Strongly Suggests That It Is Not Reasonable For Courts To Rely On Reduction In The "Achievement Gap" To Determine Whether A Desegregation Remedy Has Been Effective.

The Supreme Court has also determined that reliance on improved academic scores to evaluate the effectiveness of desegregation plans is inappropriate. In Missouri v. Jenkins, 515 U.S. 70, 115 S. Ct. 2038 (1995), the Supreme Court reviewed a desegregation plan that has been described as "[t]he most ambitious and expensive remedial program in the history of school desegregation." Jenkins v. Missouri, 11 F.3d 393, 397 (8th Cir. 1993) (Bean, J., dissenting). The Jenkins Court considered whether the Kansas City Missouri School District (KCMSD) could be released from previous court-ordered integration. One of the factors which had been used by a lower court to determine whether the district had remedied the effects of segregation was an assessment of whether achievement scores of non-white students had improved. The facts in that case are very instructive in evaluating whether successful integration can or should be measured by academic achievement.

The district court in that case held that in order to desegregate the KCMSD, it had to encourage cross-district integration, since the district itself was 68.3% students of color. In order to achieve improved integration, the district court approved a comprehensive magnet school and capital improvements plan which it ordered the state and the district to fund. By infusing the magnet schools with money and exceptional programs, the district court believed that "the proposed magnet plan [would be] so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs." Jenkins, supra at 2043, citing the district court opinion Jenkins v. Missouri, 639 F. Supp. 19, 132 (W.D. Mo. 1985). The magnet program alone cost $448 million.

The district court also ordered substantial capital improvements to combat the deterioration of the KCMSD facilities. These improvements included the renovation of approximately 55 schools, the closure of 18 facilities, and the construction of 17 new schools. The total cost of capital improvements was over $540 million. Jenkins, 115 S. Ct. at 2044.

The state was also ordered to provide salary assistance to the district. These included all but three of the approximately 5000 employees. The total cost of this part of the program was over $200 million. Id.

The amounts spent per pupil in the KCMSD were far greater than those spent on students in surrounding suburbs. Id. Expenditures on students in suburban districts ranged from $2,854 to $5,955; the record on per pupil costs within the KCMSD, excluding capitol costs, indicated expenditures between $7,665.18 and $9,412. Jenkins, 115 S. Ct. 2045, n.1.

Furthermore, the educational inputs were, by most reasonable measures, extraordinary. The massive expenditures financed "high schools in which every classroom [had] air conditioning, an alarm system, and 15 microcomputers; a 2,000-square-foot planetarium; green houses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television

studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 3,500-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animal rooms for use in a zoo project; swimming pools; and numerous other facilities." Jenkins, 115 S. Ct. at 2044-45 (quoting Jenkins II, 495 U.S. 33, 77. 110 S. Ct. 1651, 1676-77 (Kennedy, J., concurring in part and concurring in judgment). The total cost of these improvements was more than 1.3 billion dollars. Mark Walsh, Achievement Standard at Issue in Kansas City Case, Education Week, Jan. 11, 1995, at 18, 27.

Protected students in kindergarten through grade 7 had always attended these AAA-rated schools; protected students who had previously attended schools rated below AAA had since received remedial education programs for a period of up to seven years. In spite of these extensive inputs, both financial and academic, the district court found that although "there ha[d] been a trend of improvement in academic achievement . . . the school district was far from reaching its maximum potential because KCMSD is still at or below national norms at many grade levels." Missouri v. Jenkins, 11 F.3d 755 (8th Cir. 1993). The district court and the Court of Appeals ordered the State and the school district to continue implementation of enhanced educational programs and improvements. The Court of Appeals held that the test for determining whether the desegregation plan had been effective included an analysis of whether the academic achievement of students of color had been improved. "The test, after all, is whether the vestiges of segregation, here the system-wide reduction in student achievement, have been eliminated to the greatest extent practicable. The success of quality education programs must be measured by their effect on the students, particularly those who have been the victims of segregation." Id. at 766.

However, the Supreme Court reversed the lower courts' conclusions. It stated:

> But this is clearly not the appropriate test to be applied in deciding whether a previously segregated district has achieved partially unitary status. . . . [T]he District Court should sharply limit, if not dispense with, its reliance on this factor. . . . Just as demographic changes independent of de jure segregation will affect the racial composition of student assignments. . . . so too will external factors beyond the control of the KCMSD and the State affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus. . . . Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the KCMSD will be able to operate on its own."

Jenkins, supra, 115 S. Ct. at 2055-56 (emphasis added). See also People Who Care v. Rockford Board of Education, 111 F.3d 528 (7th Cir. 1997).

3. The Experience In The Minneapolis School District Amply Demonstrates That Significant Racial Balance Does Not Result In Improved Academic Achievement.

The experience of Minnesota's largest school district also demonstrates that reliance on a positive connection between racial balance and improved academic performance for non-white students is misplaced.

In 1972, the Minneapolis School District was found to have engaged in intentional discriminatory practices in the assignment of students and faculty. After protracted litigation, MSD made significant changes in its practices to reach several court-imposed quotas for student and faculty racial balance. In 1982, MSD was released from federal court supervision and began a series of plans aimed at achieving further racial balance.

The first five-year plan, which was approved in the spring of 1982, called for extensive changes, among them the closing of 18 city schools, the redrawing of school boundaries, and the reassignment of teaching staff, district wide. Among other major strategies formally adopted for the desegregation of schools was the establishment of magnet schools to enhance the number of district-wide academic program choices. In addition to the Liberal Arts Magnet, established at Central in 1971 and relocated to South, along with the Open School, seven additional magnets were put in place in 1982. See District's Desegregation Plan, January 27, 1993, revised, March 27, 1993, pp. 3-4, Ex. 5.

From 1983 on, program choice as a district-wide strategy for achieving desegregation/integration was steadily expanded. A Welcome Center was opened in September 1986, which had as part of its goal making sure that schools were in compliance with the desegregation rule. Also, two new elementary magnets were opened: the International Fine Arts at Longfellow and the Math/Science/Technology program at Willard. Id. Other magnets were opened and expanded in 1989. From 1983 until 1990, only two schools exceeded the racial balance requirement of the rule; those were corrected within the same academic year. Id.

In April of 1991, the Four Winds School, a K-8 American Indian and French Immersion Program was planned to be opened in the fall of 1991. Based on the registration in the spring, it became clear that the school would not be in strict numerical compliance with the rule. A waiver was sought and granted. Id.

In the fall of 1991, more magnets were added. These included Global Arts and Communications at Sheridan; Math/Science/Technology at Wilder and Pillsbury; Urban Environmental Studies Magnets at Dowling, Shingle Creek and Northrop Elementary and at Anwatin and Sanford Junior High Schools; an Aviation and Aerospace Magnet at Washburn High.

Since 1992, the District has used a number of desegregation/integration strategies, including: smaller class sizes; school reconfigurations, including school pairings, changing attendance boundaries, closing schools, opening/reopening schools and building new schools; controlled enrollment; transportation of students; Open Enrollment and Inter-District Transfer Policies limiting transfer of white students out to other districts and limiting the transfer of students of color in from other districts. Id. at 3-6.

Since being released from federal court supervision, the vast majority of the District's elementary schools have been in compliance with the state's desegregation rule. This is a very significant accomplishment, given the tremendous changes in the composition of the district, which has gone from a non-white enrollment of 35.25 in 1983 to 66% (grades K-6) in 1995, and the dramatic transitions in population each year (approximately 14,000 of the districts' 40,000

students come into or leave the district each year: some schools experience 50% turnover in student population in one year.) See Ex. 16, p. 2.

However, despite the tremendous efforts and concurrent success of the MSD in achieving racial balance, significant academic disparities between white and non-white students appeared and continued to grow. See Exs. 43 and 44.

The District itself noted the growing difference in achievement, despite the resources and efforts expended to achieve racial balance. The District described the dilemma this way:

> The desegregation orders and rules of the past were based on the assumption that our student body would be mostly white. Compliance meant preventing racial isolation for "minority" students. Today Minneapolis is blessed with such a rich diversity that no one racial or ethnic group represents a majority. We are literally a school community of minorities. Consequently, the orders and rules of the past are woefully out of date with the realities of the present. . . . Nevertheless, we our tremendous energy into achieving racial balance as defined by the orders and rules of past decades.
>
> There was a stated assumption that these remedies would result in all students having equal educational opportunities. The unstated assumption was that there would be equal educational outcomes. But when the data regarding outcomes is examined there is little evidence that outcomes are substantially different than when desegregation began. . . .
>
> A gap between the achievement of students of color and white students has persisted and is growing yearly. Unless the Minneapolis Public Schools and its school community focus their attention and are held accountable for eliminating the gap, it will not happen. If we do not close it, the schools and the community will have failed. The remedies of the past have not been sufficient to meet the needs of our students. Increasingly, families are calling on the schools to attack the problem of student achievement directly. It is time we did so. . . . From the students that current policies are failing, the demand is clear: make something happen and make it happen now.

Quality Schools Study, Ex. 34, p. 20. The District applied to the Commissioner for a variance from the current desegregation rule in an effort to implement a system that did not rely heavily on strict racial quotas to achieve better academic performance.

In reviewing the variance application, the Commissioner agreed that adhering to strict racial balance was not meeting the goal of increased academic performance. The Commissioner found:

> . . . . The policy statement of the [current] desegregation rule recognizes that integration of students is related to two compelling public policies: improving academic achievement and increasing mutual understanding among students from all backgrounds. Minn. R. 3535.0300 (1995).

. . . . An important predicate behind achieving optimal racial balance within school buildings is that children of different races cannot truly learn to respect one another or refrain from engaging in discriminatory behavior unless they have opportunities to come into direct contact with one another. However, it does not necessarily follow that bringing children of different races into direct contact with one another will alone result in mutual respect among them and the eradication of discriminatory behavior.

. . . . The District has expended much energy and many resources in an effort to achieve racial balance within its school buildings. However, at the same time, it has experienced an increasing achievement gap between students of color and white students. . . . This demonstrates that, in the Minneapolis schools, merely achieving numerical racial balance does not improve students' outcomes. Moreover, the "achievement gap" represents another barrier to reaching greater racial harmony. This is because differences in academic progress aggravate the perception of differences between students. Moreover, differences in academic achievement result in greater socioeconomic and cultural disparity once students take their place in the work force.

. . . . Thus, to some extent, seeking to achieve greater racial balance has worked against the policy goal of obtaining greater academic achievement. This is related to many factors including lack of proximity to school, the negative impact this has on parental involvement, and the time and money spent on busing. Moreover, differences in achievement can undercut the important policy goal of eliminating differences between learners of color and in improving racial harmony. Although providing parents and students the opportunity to attend community schools may result in greater concentration of learners of color at some schools, the community schools concept is aimed at eliminating the achievement gap. Elimination of that gap will result in fewer differences between students and therefore greater racial and cultural integration. The commissioner therefore finds that working towards elimination of the achievement gap is as essential to achieving a fully integrated society that is free of discrimination based on race as is bringing students of different races into direct contact with one another through busing and other measures designed to improve numerical racial balance at every building. Moreover, focusing on increased parental and community involvement may advance other compelling policy interests, such as preventing failure due to delinquency and crime. . . .

Ex. 16.

4. <u>The Factors Discussed Above Strongly Support The Conclusion That The Proposed Rule Should Not Require Districts To Close The So-Called Achievement Gap As Part Of Their Desegregation Plans.</u>

From a sociological standpoint, the best that can be said about the alleged correlation between improved academic achievement and desegregation is that there is no consensus; several prominent sociologists have now flatly rejected the contention that there is any connection and

further have concluded that such a theory has no place in evaluating the success of desegregation plans. The United States Supreme Court has also concluded that lower courts should "sharply limit, if not dispense with, reliance [on improved academic achievement]" in evaluating desegregation plans. The experience in the Minneapolis School District is also evidence of the fact that achievement scores may decline, even in the presence of extraordinary efforts to achieve racial balance.

The common thread running through all of this experience and analysis is that there are too many variables which impact student achievement over which districts have absolutely no control. Nevertheless, the Roundtable drafts sought to hold districts accountable for these variables and for outcomes by threatening to reconstitute school sites which did not reduce the achievement gap. This is simply not a reasonable penalty. Furthermore, there are potential legal ramifications to holding districts responsible for reducing the achievement gap, including suits premised on the theory that, given the rule, it is part of a district's duty to guarantee improved academic scores. Districts would have been put in the position of expending many resources, and incurring additional liability, for a policy goal only questionably related to the purpose of the rule. Furthermore, districts could have suffered consequences and been exposed to increased liability for an outcome which most agree is beyond their ability to guarantee.

Thus, the State Board of Education and Commissioner concluded that it would not be reasonable to include a requirement to reduce the achievement gap in a rule on desegregation. However, both the Board and the Commissioner are very committed to addressing learning disparities. The newly passed graduation rules establish regular testing, which will enable districts to more accurately track how students are achieving in the several years leading up to graduation. This is a more reasonable and logical context in which to address achievement issues.

ROUNDTABLE DRAFT DEFINITIONS CONTINUED

B. Learners of Color (Subpart 3)

"Learners of color" are persons who identify themselves or are identified in the general categories of African/Black Americans, American Indian/Alaskan Natives, Asian/Pacific Americans, or Chicano/Latino Americans.

Minnesota Indian learners possess a dual status as learners of color and as members of sovereign tribal nations.

SUBSEQUENT HISTORY OF THIS LANGUAGE:

This language has been incorporated into the rule as now proposed essentially verbatim. See part 3535.0110, subps. 2 and 4A.

ROUNDTABLE DRAFT DEFINITIONS (CONTINUED)

C. Metropolitan Area (Metro Area) (Subpart 4)

The metropolitan area includes school districts in the following counties: Anoka, Carver, Dakota, Hennepin, Ramsey, Scott and Washington.

REASON THIS LANGUAGE WAS NOT ADOPTED:

See discussion of Roundtable definition of "segregation" in paragraph "I". below.

ROUNDTABLE DRAFT DEFINITIONS (CONTINUED)

D. Desegregation (Subpart 5)

Desegregation is the process of eliminating intentional or unintentional separation of learners of color or staff of color within or among school districts.

This definition of "desegregation" was not adopted because it does not make the important distinction between intentional segregation and racial imbalance. See Sections III. and V.B.9.

ROUNDTABLE DRAFT DEFINITIONS (CONTINUED)

E. Integration (Subpart 6)

Integration is the result of eliminating barriers in bringing about equal educational opportunities for all diverse groups of learners.

REASON THIS LANGUAGE WAS NOT ADOPTED:

This language was not adopted for a variety of reasons. First, several important concepts are not defined. Specifically, it is not at all clear what types of barriers to equal educational opportunity are being referenced. Second, the notion of integration traditionally has to do with greater interracial contact. (See, for example, discussion of "racial balance," Section V.G.1). This definition equates integration and equality of educational outcomes, without any mention of the racial component; given the commonly accepted notion of integration, this is arguably not a reasonable definition. Finally, the definition incorporates the notion that successful integration should be measured by whether educational outcomes are equal. See discussion under Roundtable definition of "Equal Education Opportunity," above.

ROUNDTABLE DRAFT DEFINITIONS CONTINUED

F. Racially Isolated District (Subpart 7)

Any school district which exceeds 50 percent learners of color.

REASON THIS LANGUAGE WAS NOT ADOPTED:

This definition was replaced with a new definition of racially isolated districts in 3535.0110, subpart 7. The major reason for the change was so that out-state districts would be included in the new rule's more comprehensive interdistrict integration efforts. The definition now proposed is also based on a comparative definition that requires adjoining districts to work

together rather than defining an absolute formula for racial isolation. This is more reasonable from a logistical perspective.

ROUNDTABLE DRAFT DEFINTIONS CONTINUED

G. Reconstituted School Site (Subpart 8)

A school site whose staff is dissolved because the learners of that site have not made adequate progress toward reducing the gaps for learners of color identified in Subpart 2.

Once a school site is dissolved, it will be reconstituted by recomposing a staff and/or administration that is approved by the local Board of Education. The recomposed staff and/or administration will initiate effective methods and results in closing the learning gap for learners of color.

REASON THIS LANGUAGE WAS NOT ADOPTED:

This language was omitted for two significant reasons. First, neither the State Board of Education nor the Commissioner have statutory authority to reconstitute school sites; this would require a legislative change, which has not been made.[4] Second, this section is also related to the other "closing the achievement gap" components in the rule and is thus not supportable. See discussion in definition of "Equal Educational Opportunity," above.

ROUNDTABLE DRAFT DEFINITIONS CONTINUED

H. Resegregation (Subpart 9)

"Resegregation" is intentional or unintentional separation of or discrimination against learners of color or staff of color within a desegregated building or school district.

REASON THIS LANGUAGE WAS NOT ADOPTED:

There are several reasons why this concept of resegregation was not incorporated into the rule now being proposed.

Traditionally, "resegregation" is used to refer to schools that have returned to a segregated condition after a court has imposed and then lifted an order to desegregate. The resegregation is due to actions not attributable to governmental entity. See Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 96 S. Ct. 2697 (1976); Freeman v. Pitts, 503 U.S. 467, 112 S. Ct. 1430 (1992); Riddick v. School Board, 784 F.2d 521 (4th Cir. 1986). The Roundtable definition above expands that common meaning of "resegregation" in non-supportable and unreasonable ways.

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[4] It should be noted that in 1994, the SBE sought legislative approval for authority to reconstitute school site; the legislature did not give the Board that authority, and has not since given that authority. See 1994 Minn. Laws ch. 647, art. 8, sec. 1 (Ex. 6).

First, the definition makes no distinction between intentional resegregation and resegregation which is the result of private actions not caused by a governmental entity. The Supreme Court has repeatedly held that schools and states are not responsible for resegregation which is not intentionally caused by a governmental actor. In Freeman, 503 U.S. at 495, 112 S. Ct. at 1448, the Court held:

> Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such result would require ongoing and never-ending supervision by the courts of school districts simply because they were once de jure segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.

See also Board of Education v. Dowell, 498 U.S. 237, 111 S. Ct. 630 (1991). This rule would extend the duty of the State and school districts well beyond what the Supreme Court has required of courts and is not supportable for that reason. Furthermore, as is true of the policy with respect to courts, the policy places a burden on school authorities to monitor and respond to ever-changing residential housing choices, which is likewise very difficult and even unreasonable to address through administrative means.

Moreover, the Roundtable draft language requires that districts "show evidence of efforts to eliminate resegregation patterns, such as tracking and enrollment patterns in courses and programs" (3535.0400, subpart 4.G). From a functional perspective, it is difficult to imagine what type of evidence or effort might be required to eliminate unintentional "resegregation" in courses and programs. It is one thing to eliminate intentional over-assignment of protected students to special education classes; it is quite another to ensure that elective classes, such as math or literature classes, maintain a particular degree of racial balance. See People Who Care v. Rockford Board of Education, supra at 536-37 (court cannot order racial quotas in tracking students). The Roundtable rule draft would arguably require evidence of such efforts. This is well beyond the duty and perhaps even the ability of districts. For these reasons, the definition was excluded in the rule as now proposed.

ROUNDTABLE DRAFT DEFINITIONS CONTINUED

I. Segregation (Subpart 10)

1. "Segregation" is intentional or unintentional separation of learners of color or staff of color within a building or school district.

2. A district is considered to be segregated when:

a. A metro area district has a district-wide average learners of color population that is 15 percentage points or more over the metro-wide learners of color percentage; or,

b. A district in the metropolitan area:

1) has less than 10 percent learners of color in the district; or,

2) is below ½ of the metro-wide learners of color percentage.

District shall use (1) or (2) whichever is greater.

REASON THIS LANGUAGE WAS NOT ADOPTED:

One of the important reasons this language was not adopted is because it fails to make a distinction between intentional forms of segregation and racial imbalance. See Sections III. and V.B.9.

There are also several reasons this language, which defines which districts must participate in cross-district desegregation efforts, is not reasonable.[5]

This definition would have established an unreasonable standard for segregation which occurs across district lines. Under this definition, "segregation" would have been identified by comparing any individual district's protected student average to the average of the "metro-area" districts. As of 1994, when the rule was being considered, the metro-average of non-white students was 18%. Under those demographic conditions, if a district was to comply with the rule, it could not have a student of color enrollment greater than 33%; at the other end of the spectrum, a district could not be less than 10%, or else below ½ of the metro-wide non-white average (whichever is greater; in 1994, 10% would have been the triggering number.)

Thirty seven districts in the metro area were outside of these percentages (See Ex. 38, 1994 Roundtable Report, Attachment E). They included such far-removed locations as Stillwater, Waconia and Jordan. Furthermore, inner-ring suburbs, such as Robbinsdale, Roseville, Osseo and Brooklyn Center, did not fall into the definition of "segregated"; they were therefore not included in the districts required to participate in desegregation planning. From a purely logistical perspective, it makes little sense to require an elementary school student to be transported from Minneapolis, through Robbinsdale and into the next adjoining district, for the sole purpose of reaching a numerical definition of "racial balance." It is important to recall that effective forms of integration programs must take into account the burdens imposed on parents and children. "No school desegregation can be carried out, whether it includes the suburbs or not, that imposes an extreme burden upon parents of children. Resourceful parents will find a way of improving their situation. They may choose to send their children to private schools, as many have done. They may chose to move beyond the reach of the policy. For example, countywide desegregation in Louisville, Kentucky has led surrounding counties to become among the fastest-growing in the nation." James S. Coleman, New Incentives for Desegregation, supra, at 13. A voluntary plan which includes parents choosing to send their children such great distances is simply not workable.

Another compelling argument against this definition is cost. As indicated in App. A the cost of providing transportation across district lines is an additional $387 to $916 per student when districts are adjoining districts. The costs would be even more prohibitive if students were

[5] This analysis also addresses why the Roundtable definition of "metro-wide" was rejected.

traveling to non-adjoining districts. These costs, in combination with the burdens occasioned by the rule definition, lead to the conclusion that it is simply not a reasonable definition.

Finally, all districts meeting the definition of "segregated" would have been required to vastly increase their protected student population, or export large numbers of white students to schools in the cities. See Ex. 38, Appendix E, (Roundtable report). For example, Chanhassen, with 3.3 percent protected students, would have had to triple its protected student percentage to come into compliance with the rule. Some districts, such as Jordan and New Prague, would have to increase their percentage of minority students by up to 25 times to comply with the rule's requirements.

Because the Roundtable draft relied on voluntary methods as far as parents and students were concerned, the practical ability of "segregated" districts to meet the rule requirements was highly doubtful. However, although the rule was voluntary as it pertained to students and parents, its requirements were mandatory for districts. Indeed, districts with "continued noncompliance" with the rule would have faced reduction of state aid. (See part 3535.0900, below). Thus, given the voluntary nature of the remedy, the long distances students would have to travel, and the high numbers of students who would have to participate to result in rule compliance, it is likely that many districts would simply not have been able to comply and would have faced reduction of state aid. For all of these reasons, the definition was simply not logistically reasonable.[6] Therefore, this portion of the definition of "segregation" was not incorporated into the rule being proposed.

ROUNDTABLE DRAFT – DEFINITION OF SEGREGATION (CONTINUED)

c. Any school site in the district where the population of learners of color varies by more than 15 percentage points above or below the school district average for the grade levels served by that schools site.

REASON THIS LANGUAGE WAS NOT ADOPTED:

The major difference between this definition and the one being proposed is that this draft adds a provision to the 15% rule which has been in effect for over 20 years: i.e., even schools which are under the average of the school district by more than 15% will trigger a need for action.

For a variety of reasons, this definition is not needed. First, in urban areas with the greatest number of schools to examine, the vast majority of those which do not meet the 15% requirement will exceed it. In Minneapolis, for example, out of the some 35 elementary schools which were examined as part of the district's community school plan, only 2 were more than 15% under the district-wide average; the vast majority, or 8 were above the 15% requirement.

[6] Even in cases where intentional segregation has been found to exist, the Supreme Court has noted that "an objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process. . . . It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students." Swann, supra., 402 U.S. at 30-31, 91 S. Ct. at 1283.

See Ex. 45. Also, if the Commissioner finds evidence that certain schools are intentionally segregated, it will be possible to gather additional evidence to determine whether others, including and particularly those under the district average, are receiving better resources, or have been intentionally exempted from desegregation efforts. In this way, the same result can be achieved, without expanding the total number of schools which will initially be examined by the Commissioner to determine whether a condition of intentional segregation exists.

ROUNDTABLE DRAFT- DEFINITION OF SEGREGATION (CONTINUED)

d. The school site is a metro-wide magnet school where the population of learners of color is less than 5 percentage points above the metro-wide learners of color percentage or exceeds 50 percent learners of color.

REASON THIS LANGUAGE WAS NOT ADOPTED:

This definition is problematic for two reasons. First, it establishes a very low percentage for the racial composition of urban magnets. In 1994-95, when this draft was being considered, the metro-average of non-white students was 18%; this rule would require that magnets to be between 23 and 50% non-white students. These percentages are not reasonable in urban settings, given that the percentage of non-white students in Minneapolis and in St. Paul is far greater than 50%. If effect, this rule would cap the number of inner-city, non-white students who could participate in a magnet program, thus defeating one of the very reasons for a metro-magnet which is to give inner-city students the ability to attend classes with white suburban students. Second, the Roundtable definition makes no distinction between imbalance which is intentional and that which is the result of private choices; this raises the specter of all the problems discussed previously. For these important reasons, the definition was not included.

ROUNDTABLE DRAFT – DEFINITION OF SEGREGATION (CONTINUED)

e. If a school district chooses to establish a school which is designed primarily for attendance by American Indian learners which includes a culturally relevant curriculum, then that school is not a segregated school. Any learner in the district may choose to attend such a school. However, no learners may be required to attend such a school.

f. In further recognition of the political status of American Indian tribes and learners, this rule does not apply to schools on/near reservation areas where the percentage of American Indian learners exceeds the percentages for learners of color established in B, C, and D of this subpart.

Reason this language was not adopted: See Section V.G.2., discussion of language pertaining to American Indian students.

ROUNDTABLE DRAFT – DEFINITION OF SEGREGATION (CONTINUED)

g. Until September 1, 1996, the following definition shall be in effect:

Segregation occurs in a public school district when the composition of learners of color in any school building exceeds the learners of color percentage of the entire district by more than 15 percent for the grade levels served by that school building.

REASON THIS LANGUAGE WAS NOT ADOPTED:

This language does not comply with rulemaking requirements for repeal of rule language. See Chapter 14 generally.

ROUNDTABLE DRAFT – DEFINITIONS (CONTINUED)

h. Unique Political Status (Subpart 11)

Unique political status is derived from the treaty making relationship between sovereign tribal nations and the United States Government.

REASON THIS LANGUAGE WAS NOT ADOPTED:

This language was not adopted for a number of reasons. First, it only partially states the nature of the complex source of American Indians' political status. Second, it is not "rule" language, but rather, is more in the nature of the reason why American Indians are treated differently under the rule. Thus, it is actually more appropriate for a Statement of Need and Reasonableness. The rationale for treating enrolled American Indians differently is discussed in Sections V.G.2.

ROUNDTABLE DRAFT – DEFINITIONS (CONTINUED)

i. State Approved Metro Magnet Schools (Subpart 12)

Public schools established under the provisions of Minn. Stat. § 124C.498 and Minn. Law, Chapter 643, section 38 (1994).

REASON THIS LANGUAGE WAS NOT ADOPTED:

This language was not adopted because the rule as proposed does not contain a provision concerning metro-magnet school applications.

III. ROUNDTABLE DRAFT: COMMUNITY LEARNING AND DESEGREGATION /INTEGRATION PLANS (3535.0200)

A. Criteria for Districts Submitting Plans (Subpart 1)

1. **All districts must submit a plan that addresses subps. 2 and 3 of this part.**

2. **All districts meeting the criteria specified in part 3535.0300, subp. 10 must submit a plan that addresses the provisions of subp. 2, 3, and 4 of this part.**

3. **All metropolitan districts that do not meet the criteria specified in part 3535.0300, subp. 10 must submit a plan as to how it will collaborate with other metropolitan districts to maintain or improve an educational program that is consistent within the provisions of part 3535.0300, subp. 5 and 6.**

4. **All district desegregation/integration plans must be reviewed and approved by the district by the district's Community Learning Council established under 3535.0500 prior to approval by the local Board of Education.**

REASON THIS LANGUAGE WAS NOT ADOPTED:

This portion of the Roundtable draft requires districts to submit plans which include learning gap components (subpart 2), educational diversity components (subpart 3) and racial balance components (subpart 4). The rationale for omitting learning gap requirements from the rule as now proposed has been previously discussed; See Section II. A. of this Appendix (above). The rationale for omitting the diversity component is contained in this Section at III. C; below; the rationale for omitting racial balance requirements is addressed in Section V.G.1 of the SONAR (introduction section to part 3535.0160)

ROUNDTABLE DRAFT (CONTINUED) (3535.0400)

B. Learning Gap Component (Subpart 2)

The component of the plan for closing the learning gap must include at least the following:

1. **Current achievement levels of all students district-wide at least in the areas of reading, mathematics, and writing;**

2. **District criteria which identify the learners to be served by compensatory learning revenues;**

   a. **Low achievement levels**

   b. **Attendance Information**

   c. **Drop out rates**

d. **Compensatory interventions**

e. **Suspension and expulsion information**

f. **Self-perception inventory**

g. **Language Assessment**

3. **Measurable results which the district expects to achieve with learners being served by compensatory revenue program(s), over a two-year period of time, through the implementation of the Community Learning Plan;**

4. **Measurement procedures to determine progress toward achieving results;**

5. **The process as to how the results will be reported to the public;**

6. **Identify instructional methods and/or strategies to be implemented to address the learning needs of all students;**

7. **Strategies for professional development training of district staff to address t he diverse learning needs of all students.**

8. **Identify the local, state, and federal educational resources that will improve the achievement of all learners and that reflect the diversity of educational needs;**

9. **Identify other public agencies that will assist and commit resources in students attaining learning results.**

REASON THIS LANGUAGE WAS NOT ADOPTED:

See rationale discussed in Section II. A. of this Appendix for reasons that achievement and learning gap sections of the Roundtable draft were omitted from the State's desegregation rule.

ROUNDTABLE DRAFT (CONTINUED) (3535.0400)

C. Educational Diversity Component (Subpart 3)

The component of the plan addressing education diversity must comply with the provisions of the Education Diversity rule, as set forth in part 3500.0550.

REASON THIS LANGUAGE WAS NOT ADOPTED:

This language is not needed in the State's desegregation rule; it would be duplicative to require districts to submit desegregation plans with diversity components as well as separate diversity plans.

ROUNDTABLE DRAFT (CONTINUED) (3535.0400)

D. Racial Balance Component (Subpart 4)

The component of the plan required under subp. 1B of this part must address racial balance within and among school districts. The racial balance component may include an array of options to allow for school district flexibility in implementing a racial balance plan. The plan must include at least the following:

a. District goals and strategies for achieving them that assures that the district will eliminate segregation to the greatest extent possible.

b. Documentation of substantial community involvement and recommendations from the community learning council in developing the racial balance plan;

c. Description of the specific activities to be implemented by the district in addressing racial balance;

d. Descriptions of the array of options that will be available so individual students and parents may make informed decisions when participating in racial balance efforts;

e. Justification for exceptions, if necessary, to the efforts to eliminate segregation at the school site;

f. Evidence of collaboration with other districts to address racial balance on an inter-basis;

g. Evidence of efforts to eliminate resegregation patterns, such as tracking and enrollment patterns in courses and programs;

h. Anticipated building and remodeling programs to be utilized in desegregation/integration efforts, as appropriate;

i. District staffing assignments and practices to retain, recruit, and prepare educators and staff of color;

j. Availability of transportation to implement the strategies for addressing racial balance.

k. Timelines for implementing the plan; and

l. **An evaluation of the effectiveness of the plan.**

SUBSEQUENT HISTORY OF THIS LANGUAGE:

Most of these provisions have either been incorporated into the rule as now proposed or are part of the Inclusive Education rule. Only a few have been omitted.

Some portions of subpart 4(a) "establishing goals for racial balance" have been retained. See 3535.0160,subps. 2 and 4; 3535.0170, subps. 4 and 5; 4(b) "documentation of community involvement," is contained in 3535.0160, subp. 4.B. and 3535.0170, subp. 5A; 4(c) "description of activities to address racial balance" and 4(d), a "description of the array of options" are contained in intra-district and inter-district plans, (See proposed Sections 3535.0160 and 3535.0170 generally); 4(f) "evidence of collaboration with other districts" is contained in 3535.0170 generally; 4(h), "anticipated building and remodeling" is implicit in the both inter and intra-district plans, see 3535.1060 and .0170; 4(i), "District staffing assignments and practices to retain, recruit and prepare educators and staff of color" is contained in both 3535.0160, subpart 4.D.(3) and 3535.0170, subpart 5.D.(1); 4(j) "availability of transportation" is contained in 3535.0160 and 3535.0170; subpart 5.D.(1); and 4(k) "timelines for implementing the plan" will be three or four years. See Sections 3535.0160, subp. 6 and 3535.0170, subp. 6. The last requirement "an evaluation of the effectiveness of the plan" will be done by the Commissioner instead of the district, under 3535.0160, subp. 5 and 3535.0180.

The major differences between the Roundtable draft and the rule being proposed concerns the Roundtable's stress on the need to eliminate segregation (clauses "a" and "e") and the requirement that district provide evidence of effort to eliminate resegregation patterns (clause "g").

Instead of stressing the need to eliminate segregation, the proposed rule stresses the need to increase interracial contact through a variety of strategies. Given the residential isolation that exists in many urban areas today, it is not reasonable to expect that school districts will be able to "eliminate" segregation; however, it is reasonable to encourage districts to reduce racial isolation by increasing the opportunities for interracial contact and by providing incentives for that contact.

Similarly, as discussed previously, it is not reasonable for districts to "eliminate" resegregation patterns. Resegregation is the result of many forces which are frequently beyond the ability of governments to regulate. "Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." Riddick v. School Bd., 784 F.2d 521, 535 (4th Cir. 1986) (emphasis added). See also Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 96 S. Ct. 2697 (1976); Davis v. E. Baton Rouge Parish School Bd., 721 F.2d 1425, 1434 (5th Cir. 1983) ("[c]hanges in neighborhood ethnicity taking place after school officials have transformed their system into a unitary one need not be remedied, of course, for school officials are under no duty to adjust for the purely private acts of those who chose to vote with their feet.") It is not reasonable to require districts to take action to address situations which courts

have recognized as being beyond the control of a district; for that reason, the provision regarding resegregation was omitted.

ROUNDTABLE DRAFT (CONTINUED) (3535.0400)

E. Consortia (Subpart 5)

For those districts choosing to form a consortium of districts to develop a joint plan under this part, the plan shall describe the governance structure for implementation of the plan.

REASON THIS LANGUAGE WAS NOT ADOPTED:

The rule as now proposed uses the idea of a consortium referenced in the subpart above and expands upon it. Under the rule as it is now proposed, districts which adjoin racially isolated districts are required to form multi-district councils to work cooperatively to propose inter-district desegregation strategies. The structure of those councils is also provided in the rule as now proposed. Thus, while this language was not adopted verbatim, the concept has been adopted and expanded. See proposed rule part 3535.0170.

ROUNDTABLE DRAFT (CONTINUED) (3535.0400)

F. Racial Isolation (Subpart 6)

School districts located in the same county as racially isolated school districts and school districts located in the metropolitan area must address how they will reduce the disparities in the racial composition of the learner of their district(s) and the racially isolated school district(s).

REASON THIS LANGUAGE WAS NOT ADOPTED:

Although this precise language was not adopted, the concept has been incorporated and expanded upon in the rule as now proposed. The language above required only that school districts with less than 50% protected students or those in the metro area take some action to address the disparities between themselves and proximate districts with more than 50% non-white enrollment. The above language does not suggest what should be done or how it could be accomplished; further, there is no monitoring and no penalty if districts fail to take action of some sort.

The language which is now being proposed is far more comprehensive and effective. It requires affirmative, cross-district efforts to provide more options for racially isolated districts. There is also a mechanism for monitoring the success of these efforts. See, e.g., 3535.0170; 3535.0180. For these reasons, the language now being proposed is more likely to accomplish the goal of increased cross-district integration for adjoining districts.

ROUNTABLE DRAFT (CONTINUED) – 3535.0400

G. Community Forums (Subpart 7)

A district required to submit plans under this part shall hold community-wide public discussion opportunities to receive and record public comment on the proposed impact of the plan on the community and schools. A summary of the comments from the community forum must be included in the report to the commissioner.

REASON THIS LANGUAGE WAS NOT ADOPTED:

Although this precise language was not adopted, the concept and goals of the Roundtable draft have been reincorporated into the language now being proposed. Part 3535.0160 requires districts to form "community collaboration councils" which include representatives of the community. Furthermore, "the district must report to the Commissioner the extent of community outreach which preceded the plan." This language is quite consistent with that proposed in subpart 7 above.

IV. ROUNTABLE DRAFT: ESTABLISHMENT OF A COMMUNITY LEARNING COUNCIL (3535.0500)

A. The local school board for those districts as specified in M.R. 3535.0400, Subpart 1, shall establish a local Community Learning Council. A consortium of districts may cooperate to establish one Community Learning Council. The purpose of the Community Learning Council shall be to:

1) **advise and report to the local board on the development and implementation of the district's Community Learning and Desegregation/Integration Plan;**

2) **review and monitor the implementation of the Community Learning and Desegregation/Integration Plan;**

3) **provide input to the content of the Community Learning and Desegregation/Integration Plan; and**

4) **review district staff development plan as it relates to desegregation/integration.**

B. Composition of the Community Learning Council:

1. **The overall composition of the Community Learning Council shall be culturally and racially diverse. The Council's composition shall have**

substantial input by communities of color or reflect the constituency of people of color within the school district.

To the extent possible, the Community Learning Council shall include the following members:

a) Parents or guardians;
b) Learners;
c) Community agency representatives (social services, migrant services, employment, mental health personnel, public and private agencies, etc.);
d) Law enforcement representative;
e) Housing representative;
f) Transportation representative
g) Representative of a local business;
h) Local city and county representative;
i) Representative of post secondary education or higher education institutions;
j) School administrator;
k) Teachers and school support staff;
l) School board member;
m) Site council members; and
n) Others appointed by the local school board.

The majority composition of the committee shall be persons who are not employees of the district.

2. For communities that have a significant American Indian population, an elder of the community may be considered to serve on the Community Learning Council.

3. To encourage the participation of non-English speaking constituencies, the district shall make interpreters/translators available to the council.

4. If a district already has an existing committee available whose composition reflects the various groups listed above, the committee may be used for the purposes described in M.R. 3535.0500, Subpart 4 (A).

SUBSEQUENT HISTORY OF THIS LANGUAGE:

This language has basically been incorporated into the rule now being proposed. See 3535.0170. The major differences are that the representatives on the council are not specified and an interpreter is no longer required.

The Board and later the Commissioner determined that it was not necessary to "micro-manage" the qualifications of the individuals who would be serving on the multi-district collaboration councils; instead, the new rule describes the type of community contact council members should have, requires that the council membership be reasonably reflective of the racial composition of the district, but gives the district discretion to chose the particular individuals who will serve.

The Roundtable draft also required districts to provide interpreters for the council; after consideration, it was determined that this might be an unreasonable cost to impose on districts. Thus, this language was omitted.

V. ROUNTABLE DRAFT: DUTIES OF LOCAL BOARDS TO SUBMIT DATA ON RACIAL COMPOSITION AND COMMUNITY LEARNING AND DESEGREGATION/INTEGRATION PLAN. (3535.0600)

A. Submission of Data Regarding Racial Composition (Subpart 1)

1. Timeline for Submission of Data

All local boards shall submit to the commissioner by November 15 each year data indicating the number of learners by race for each of the school sites under its jurisdiction. If a local board fails to submit such data by November 15 annually, the commissioner shall notify the local school board of noncompliance. The local board shall submit data, as required within 30 calendar days of notification by the commissioner.

SUBSEQUENT HISTORY OF THIS LANGUAGE:

This language has been reincorporated into 3535.0120, subp. 1. The main difference is that the date of submission now corresponds to MARSS reporting schedules.

ROUNDTABLE DRAFT (CONTINUED) – 3535.0600

2. Options for Determining Race

In order to collect information from reports, all local schools boards shall employ one racial or cultural identification procedure in the order of preference as follows:

a) Parent or guardian identification, with parent or guardian being encouraged to discuss the identification rationale with the learner prior to the identification.

b) Age-appropriate learner self-identification, when parent or guardian identification is not an option;

c) Sight counts may be employed only if parent, guardian, or learner self-identification methods are not possible. Districts shall utilize written guidelines to develop sight counts as administered by the principal or designee.

d) In districts where the American Indian population is over 10 or more learners, the State Indian Education Act Statutory Committee, in consultation with American Indian parents they represent, may select as their count one of the following methods:

1) parent/guardian self-identification;

2) the federal Indian Education Act – Title V Count (Indian Certification Form #506); or

3) a district shall use the same method of count as for other learners.

SUBSEQUENT HISTORY OF THIS LANGUAGE:

This language has been retained virtually verbatim as Section 3535.0120, subps. 2 and 3.

ROUNDTABLE DRAFT (CONTINUED) – 3535.0600

B. Submission of Community Learning and Desegregation/Integration Plan (Subpart 2)

1. Timelines for Submission of Community Learning and Desegregation/Integration Plan.

Each district defined in M.R. 3535.0400 Subpart 1 shall submit its Community Learning and Desegregation/Integration Plan within the following timelines:

a. By January 1, 1996, all required districts shall submit Desegregation/Integration Plans to the commissioner.

b. All plans shall be subject to continuing review and evaluation by districts at least every three years after the date of initial approval or more frequently as directed by the commissioner. Districts shall submit amendments or modifications to the Community Learning and Desegregation/Integration Plan. The implementation of any proposed amendments or modifications shall not take effect until it has been approved by the commissioner.

REASON THIS LANGUAGE WAS NOT ADOPTED:

The types of plans which will be required under the rule as now proposed will vary, depending on whether they are to remedy a finding of intentional discrimination or to implement a voluntary plan. Different timelines apply, depending on the nature of the plan. The timelines specified above are based on totally different kinds of plans; therefore, they are not applicable in the rule as proposed.

ROUNDTABLE DRAFT (CONTINUED) – 3535.0600

C. Data Regarding Closing the Learning Gap (Subpart 3)

By November 15, 1998 and annually thereafter, districts required to implement a learning gap reduction plan shall submit data, as required by the commissioner, to document its compliance or lack thereof.

REASON THIS LANGUAGE WAS NOT ADOPTED:

Again, this language was omitted because it requires desegregation plans to address academic achievement. See analysis under Section II. A. in this Appendix.

VI. ROUNDTABLE DRAFT: METRO ENROLLMENT OPTIONS (3535.0700)

A. In addition to the provisions of the open enrollment statutes, learners of color from a racially isolated school district shall at any time, have the right to transfer to any other districts which is segregated under the provisions of 3535.0300 Subpart 11, B.2 and be granted the same rights as if the learner resides in that district. Transportation shall be the responsibility of the receiving district, consistent with the provisions of Minnesota statutes.

B. In addition to the provisions of the open enrollment statutes, white learners from a school district which is segregated under the provisions of 3535.0300 subpart 11, B.2. shall, at any time, have the right to transfer to a racially isolated school district and be granted the same rights as if the learner resides in that district. Transportation shall be the responsibility of the receiving district consistent with the provisions of Minnesota statutes.

C. Any learner has the right to apply for admission to a state or metro-wide magnet school provided the school meets the provisions of 3535.0300 Subpart 11 C.3.

REASON THIS LANGUAGE WAS NOT ADOPTED:

Subparts A and B were not adopted because the Enrollment Options Act, Minn. Stat. §120.062, permits districts to close their doors to non-resident students for a variety of reasons. See Section 120.062, subds. 3 and 7, particularly. Therefore, this draft language was beyond the

authority of the State Board and now also the Commissioner to promulgate. Furthermore, the rule allows for race-based preferences in transfers, which is likely to be struck down if challenged. See generally Section III.C.2.

Subpart C is not necessary, because it does not accomplish any goals related to the rule; merely providing that any student can apply for admission into a school does not address whether the student will be admitted, nor does it establish the conditions under which admission might be permitted.

VII. ROUNDTABLE DRAFT: REVIEW OF COMMUNITY LEARNING AND DESEGREGATION/INTEGRATION PLAN (3535.0800)

A. Review (Subpart 1)

The commissioner shall review district Community Learning Desegregation/Integration Plan submitted under these provisions and shall determine whether they comply with M.R. 3535.0400.

REASON THIS LANGUAGE WAS NOT ADOPTED:

The types of plans and the criteria by which they will be reviewed are very different in the rule as is now proposed; therefore, the language above is not applicable.

ROUNDTABLE DRAFT (CONTINUED) – 3535.0800

B. Approval (Subpart 2)

Within 60 days of receipt, the commissioner shall notify the local board of the plan approval if it has been deemed likely to promote desegregation/integration. The commissioner shall provide the local board of education such technical assistance and services as requested by the local board and deemed necessary by the commissioner in order to implement the plan.

REASON THIS LANGUAGE WAS NOT ADOPTED:

This language was not included because it does not contain a definitive standard by which the Commissioner and the district can determine whether a desegregation plan will be approved. The phrase "seemed likely to promote desegregation/integration" gives the Commissioner far too much discretion to accept or reject a plan and may lead to arbitrary results. Similarly, districts are not sufficiently apprised of what their plans can or should contain. This is particularly problematic because a district's aid could be reduced if it continually produced plans which were not satisfactory. For all of these reasons, the language was omitted.

VIII. ROUNDTABLE DRAFT: PENALTY FOR FAILURE TO COMPLY (3535.0900)

A. If a district fails to collect and report the data required by 3535.0500 or fails to submit or meet the goals of the Community Learning and Desegregation/Integration Plan provided in 3535.0400 Subpart 1, the commissioner shall provide assistance regarding the submission of the data or the development of the Plan. Continued noncompliance shall result in action pursuant to Minn. Stat. § 124.15.

B. If a district fails to reduce the learning gap reduction data the commissioner shall inform the district whether the goals of the plans are being achieved satisfactorily for each site.

1. Within 60 days after receipt of the gap reduction data the commissioner shall inform the district whether the goals of the plan are being achieved satisfactorily for each site.

2. If satisfactory progress has not been achieved, the commissioner shall monitor the school site within 30 days of the notification of noncompliance.

3. The commissioner shall provide assistance to the site to develop strategies to work toward achieving goals within 60 days following the monitoring.

4. Within one year after receiving technical assistance and revising the plan, if the site is still in noncompliance, the commissioner may direct the local board of education to reconstitute the school site.

5. The local board of education shall have the authority to reconstitute a school site irrespective of bargaining agreements.

REASON THIS LANGUAGE WAS NOT ADOPTED:

The majority of this section concerns penalties which the Board may impose if a district fails to meet its racial balance goals or fails to meet its goals relating to closing the achievement gap. For reasons previously discussed, both the State Board and the Commissioner determined that it is not reasonable or necessary to require racial balance quotas or to measure the success of a desegregation plan on achievement results. Thus, imposing penalties for failure to reach these goals is also not reasonable or necessary.

It should also be noted that neither the State Board or the Commissioner have the statutory authority to reconstitute school sites. The Roundtable recommended legislative authority for such power, but the legislature did not grant it to the Board. See 1994 Minn. Laws ch. 647, art. 8, sec. 1 (Ex. 6).

IX. ROUNDTABLE DRAFT: CONSIDERATION OF DESEGREGATION WHEN PLANNING NEW SCHOOL SITES (3535.1000)

All decisions by local boards concerning selection of sites for new schools and additions to existing facilities shall take into account, and give maximum effect to, the requirements of eliminating and preventing racial as well as socioeconomic segregation in schools. The commissioner will not approve sites for new school building construction or plans for additions to existing building when such approval will perpetuate or increase racial segregation.

REASON THIS LANGUAGE WAS NOT ADOPTED:

This language was not new in the Roundtable draft; rather, it was taken from the desegregation rule which is now being replaced by the proposed rule. The rationale for elimination of this language is contained in Section VI., analysis for repeal of 3535.1000.